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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MICHELE PEACOCK,

Petitioner,

v.

GREAT WESTERN MORTGAGE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

NEIL M. MULLIN
Counsel of Record
NANCY ERIKA SMITH
SMITH MULLIN, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052
(201) 736-7033

Counsel for Petitioner
Michele Peacock

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act provision that excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies only to transport workers?

2. Whether the Federal Arbitration Act requires enforcement of an adhesion contract forcing employees to waive prospectively the right to a jury trial guaranteed by a state's constitution and law against discrimination?

3. Whether the Federal Arbitration Act requires enforcement of an adhesion contract forcing employees to waive prospectively substantial statutory remedies guaranteed by a state's law against discrimination?

4. Whether an adhesion contract that prohibits an employee asserting claims of employment discrimination from engaging in any discovery is enforceable under the Federal Arbitration Act.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States Court of Appeals for the Third Circuit appear in the caption to this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michele Peacock petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision in *Great Western Mortgage Corporation v. Michele Peacock*, 110 F.3d 222 (3d Cir. 1997).

OPINIONS AND ORDERS BELOW

The unreported Opinion and Order of the United States District Court for the District of New Jersey, dated April 9, 1996, staying Michele Peacock's lawsuit and compelling arbitration of Michele Peacock's claims against Great Western, are reprinted herein at Appendix 30 to 38. The Opinion and Judgment of the United States Court of Appeals for the Third Circuit, dated April 3, 1997 and reported at 110 F.3d 222, affirming the judgment of the United States District Court for the District of New Jersey, are reprinted herein at Appendix 1 to 29. The unreported Order of the United States Court of Appeals for the Third Circuit, dated May 13, 1997, denying Michele Peacock's petition for rehearing, is reprinted herein at Appendix 39 to 40.

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was filed on April 3, 1997. (App. 1 to 29). Michele Peacock filed a timely petition for rehearing with a suggestion for rehearing in banc on April 17, 1997. On May 13, 1997, the United States Court of Appeals for the Third Circuit denied Michele Peacock's petition for rehearing and denied rehearing in banc. (App. 39 to 40). The time for filing this petition for certiorari runs from the date of entry of the Order denying Michele Peacock's petition for rehearing. Rule 13.3. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides as follows:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Other federal and state statutory and constitutional provisions involved in this case are lengthy and are set forth verbatim in the appendix pursuant to Rule 14(f). They are 9 U.S.C. §§ 3 and 4 (App. 72-73), the New Jersey Law Against Discrimination N.J. Stat. Ann. 10:5-3 (App. 73-75), 10:5-13

(App. 75), 10:5-27.1 (App: 75-76) and the New Jersey Constitutional Provision concerning the right to trial by jury, N.J. Const. art. I, ¶ 9 (1973) (App. 76).

STATEMENT OF THE CASE

Michele Peacock filed suit in the New Jersey Superior Court on November 8, 1995, alleging that her former employer, the Great Western Mortgage Corporation (hereinafter "Great Western") and various individuals subjected her to sexual harassment in violation of the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.* Shortly thereafter she moved for entry of partial summary judgment on state law grounds. While that motion was pending, on February 1, 1996, Great Western filed a petition pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (hereinafter "the FAA") to stay Ms. Peacock's state court action and compel arbitration. (App. 53 to 71). Great Western's petition was filed in the United States District Court for the District of New Jersey, which had diversity jurisdiction pursuant to 28 U.S.C. § 1332. Ultimately, the District Court granted the petition and the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court. The relevant factual background of Ms. Peacock's litigation is as follows:

On August 9, 1994, Michele Peacock applied for employment as a mortgage loan consultant at Great Western's Livingston, New Jersey branch office. She was hired and began work on September 1, 1994.

Great Western is in the business of making mortgage loans in approximately 42 states. All loans made by Great Western in New Jersey and elsewhere are funded by the Great Western Bank hereinafter ("GWB"). When a loan is made to a borrower in New Jersey, the funds are wired to New Jersey from a site in Chatsworth, California. After mortgage loans are made, a portion of those loans are pooled by GWB and sold to financial institutions around the country. Thereafter,

GWB continues as a servicer of those mortgages. All advertising, personnel matters, purchasing, and payroll administration for Great Western's Livingston, New Jersey office are handled through GWB offices in California and Florida. (App. 55).

Ms. Peacock's job was to solicit residential mortgage loan business on behalf of Great Western, assist in the loan application process, and prepare loan documentation. (App. 54).

At the time she applied for employment, Ms. Peacock was required to fill out and sign a variety of Great Western forms including a "Certification" that required her:

> to submit any dispute related to [her] employment, or the termination of [her] employment, to final and binding arbitration (thus waiving any right to pursue any other administrative and/or legal proceeding), and, as a condition of [her] employment, **. . . to sign Great Western's Arbitration Agreement upon commencement of [her] employment, and to abide by the Arbitration Agreement and Great Western's Binding Arbitration Policy and Procedures.**

(App. 2) (emphasis in the original).

Ms. Peacock was not provided with the text of Great Western's "Arbitration Agreement" until after she began employment. She was never provided with "Great Western's Binding Arbitration Policy and Procedures" (hereinafter the "Binding Policy") during her employment.

On September 26, 1996, Ms. Peacock, on pain of termination,[1] signed Great Western's "Arbitration Agreement," which provided in pertinent part for binding arbitration of all employment-related disputes including:

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[1] Great Western's Binding Policy provides that "*As a condition of employment*, individuals hired on or after July 1, 1992, are required . . . to sign an arbitration agreement." (App. 65) (emphasis supplied).

> all civil claims, excluding claims under the Workers' Compensation Act, but including, and not limited to, claims of employment discrimination on the basis of race, sex, age, religion, color, national origin, disability and veteran status (including claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities.

(App. 50 to 51).

The "Arbitration Agreement" prohibits the arbitrator from awarding punitive or exemplary damages by stating that "the arbitrator may grant any remedy or relief that is just and equitable, but . . . the arbitrator shall not grant any award for punitive or exemplary damages, or any award for double or treble damages." (App. 51).

The "Agreement" precludes any award of statutory attorney's fees or expert witness costs in Ms. Peacock's favor, stating that she "understand[s] that, at [her] expense, [she] ha[s] the right to hire an attorney to represent [her] in the arbitration" and she "agree[s] to pay the fees of any witnesses testifying on [her] behalf at [her] request. . . . " (App. 51).[2]

The "Agreement" incorporates by reference Great Western's Binding Policy (App. 49), which prohibits discovery:

> To expedite arbitration, the employee and Great Western agree to eliminate discovery. In its place, each party may make a written demand on the other for lists of witnesses to be called and/or documents to be introduced at the hearing. The demand of each

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[2] Great Western's Binding Policy similarly provides as follows:

> Both parties have the right to be represented by an attorney and each party is responsible for paying its own attorney's fees.

(App. 69).

> must be made and received by the other prior to the pre-hearing conference. The lists must be delivered within ten (10) business days of receipt of the demand. No depositions may be taken for discovery.

(App. 69).

Finally, the "Agreement" and the Binding Policy provide that a one-year statute of limitations will apply to all claims. (App. 50 and 66).

Great Western concedes that the "Arbitration Agreement" is part of a contract of employment between Ms. Peacock and Great Western. (App. 54).[3]

In opposition to Great Western's petition to compel arbitration, Ms. Peacock made the following arguments:

(1) The FAA cannot be used to enforce the "Agreement" at issue here because the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Since Great Western has conceded that its "Arbitration Agreement" was part of an employment contract and that it is engaged in interstate commerce (App. 54 and 55), the FAA employment contract exclusion applies.

(2) The "Arbitration Agreement" is void as a matter of public policy and therefore unenforceable under the FAA because it denies Ms. Peacock discovery, prospectively prohibits a recovery of punitive damages and attorney's fees, and imposes a one-year statute of limitations, thereby depriving Ms. Peacock of important rights guaranteed by the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*

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[3] In its petition to compel arbitration in the District Court, Great Western averred as follows:

> The FAA applies to the agreement to arbitrate on which this Petition is based in that the agreement was part of respondent's employment agreement with Great Western, which constitutes "a contract evidencing a transaction involving commerce" within the meaning of 9 U.S.C. § 2.

(3) The "agreement" is void as a matter of public policy and therefore unenforceable under the FAA because Ms. Peacock was forced to give up her right to a jury trial prospectively in order to gain and retain employment.

(4) Ms. Peacock's waiver of rights in the "Agreement" was neither knowing nor voluntary and therefore the "Agreement" is unenforceable under the FAA.

On April 9, 1996, the District Court rejected Ms. Peacock's contentions and ordered the parties "restrained from proceeding in the concurrent state court action" pending arbitration of the matter. (App. 37 to 38).

In its brief opinion (App. 30 to 36), the District Court, without analysis, deemed the FAA applicable and did not address Ms. Peacock's public policy and waiver arguments except to note that "[t]he fact that respondent was compelled to sign the Arbitration Agreement is not offensive to public policy or to the governing law. . . . *See generally Gilmer, supra*, 500 U.S. at 32-33. . . . " (App. 35).

The Third Circuit affirmed the District Court's judgment on April 3, 1997. (App. 1 to 29). The Court of Appeals rejected Ms. Peacock's claim that the FAA did not apply, deeming itself bound by *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers of America*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). The court concluded that the FAA exclusion of any "class of workers engaged in . . . interstate commerce," 9 U.S.C. § 1, referred only to "those employed *directly* in the channels of commerce itself." (App. 10) (emphasis in the original).

The Third Circuit also rejected Ms. Peacock's claim that the "Arbitration Agreement" was invalid because she had been forced to sign it on pain of termination. The court reasoned that under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the disparity of bargaining power between Ms. Peacock and Great Western was not sufficient to invalidate the "Agreement." (App. 14-15). The Court of Appeals concluded that the District Court had not erred in

ruling that "Peacock had willingly agreed to arbitrate under Great Western's Arbitration Agreement." (App. 14 to 16).

The Third Circuit rejected as well Ms. Peacock's claim that a prospective waiver of her right to a jury trial under New Jersey's discrimination law was void as a matter of public policy. The court concluded that the FAA preempts any state law providing a judicial forum for claims within the scope of the agreement. (App. 18 to 19).

The Third Circuit characterized the agreement's restrictions of Ms. Peacock's statutory remedies (punitive damages and attorney's fees) as "waiver[s] of state law rights." (App. 21). It then held that waivers of state law rights in an arbitration agreement cannot render the arbitration agreement itself void as a matter of public policy. (*Id.*) In addition, the court held that the arbitrator, not the court, would have to decide whether Ms. Peacock's waiver of her rights to punitive damages, attorney's fees and a two-year statute of limitations was valid. (App. 21 to 22).

Finally, citing *Gilmer* for the proposition that "less extensive, more informal discovery available in [an] arbitral forum does not render [an] arbitral forum inadequate to vindicate statutory rights" (App. 21), the Third Circuit held that Great Western's preclusion of discovery by Ms. Peacock did not render the "Arbitration Agreement" void as a matter of public policy. (App. 19 to 21). In support of its ruling, the court relied upon Great Western's contention in its appellate brief that "discovery *will* be available at arbitration," (App. 20) (emphasis in the original), an argument premised upon the provision in Great Western's Binding Policy that the parties may demand of each other "lists" of witnesses or documents that will be used at the arbitral hearing. (App. 69).[4]

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[4] The Court of Appeals rejected other arguments advanced by Ms. Peacock, including her claim that Great Western, by its conduct, waived its alleged right to arbitration. (App. 22 to 27).

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant A Writ Of Certiorari To Resolve Conflicting Decisions In The Circuits Concerning The Scope Of The FAA's Employment Contract Exclusion.

This case squarely presents an issue of great importance upon which this Court reserved judgment in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), *to wit*, whether Section 1 of the FAA, 9 U.S.C. § 1, excludes from the FAA's coverage all contracts of employment or just contracts for employees in transportation-related industries. This Court declined to reach that issue in *Gilmer* because the issue had not been preserved for appeal and because the arbitration clause at issue in *Gilmer* was not contained in a contract of employment. *Ibid.* In this case, on the other hand, the issue has been fully litigated below and respondent has conceded that the arbitration clause is contained in a contract of employment. (App. 54). Consequently, a writ of certiorari should be granted to resolve a long-standing conflict between and within the circuit courts concerning the issue reserved in *Gilmer*.

Section 1 of the FAA states in pertinent part that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In ruling against the petitioner, the court below deemed itself bound by *Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers of America*, 207 F.2d 450 (3d Cir. 1953) (*en banc*), which held that "the intent of the [FAA Section 1 exclusionary] language was, under the rule of *ejusdem generis*, to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto to be in practical effect part of it." *Id.* at 452.

One year after *Tenney*, the Fourth Circuit announced a directly conflicting view in *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir. 1954):

> Nor are we impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in *Tenney*. . . . Congress in enacting the arbitration act was endeavoring to exercise the full extent of its power with relation to the subject matter. There is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its power. As said by Professor [Archibald] Cox: "One should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading 'contract of employment.'" See 67 Harvard Law Review 591, 599.

Currently, the District of Columbia Circuit, the Second, Fifth, and Seventh Circuits, and one panel of the Sixth Circuit have joined the Third Circuit in its narrow reading of the FAA employment contract exclusion,[5] while the Fourth Circuit and one panel of the Sixth Circuit read the FAA as excluding all contracts of employment from its coverage.[6]

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[5] *Cole v. Burns International Security Services*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Company v. Bates*, 71 F.3d 592, 596-602 (6th Cir. 1995); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3783 (U.S. May 16, 1997) (No. 96-1830).

[6] *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991).

The issue of whether or not the FAA excludes all employment contracts is one of national significance. The plethora of published opinions on the issue is testament to the fact that corporations throughout the nation have imposed arbitration "agreements" upon millions of employees. Given the ubiquity of such agreements, it is not surprising that substantial federal judicial resources are being expended in determining the scope of the FAA employment contract exclusion. By resolving the issue, this Court will obviate the need for such litigation, unburdening both the courts and litigants and creating certainty in the workplace.

Leaving the conflict in the circuits unresolved will needlessly strain the relationship between the state and federal judiciaries. In this case, for example, the petitioner, relying on a recent Third Circuit decision holding that employment contracts *are* excluded from FAA coverage, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1119-20 (3d Cir. 1993), filed an action in state court and moved for summary judgment invalidating the arbitration agreement on state law grounds. While that motion was pending, Great Western obtained an order from a United States District Court effectively enjoining the state court action by restraining the parties from proceeding in it. (App. 37). The Third Circuit affirmed, limiting *Pritzker* to its facts, despite its broad, unambiguous pronouncement that the FAA excludes from its coverage arbitration agreements in employment contracts, and noted that in any event, the panel in *Pritzker* was not permitted to overrule the *en banc* decision in *Tenney*. (App. 9).

Thus, out of the chaos that surrounds this issue arose an injunctive intrusion into an ongoing state court proceeding focused exclusively on state law matters, an exercise of federal power no less offensive to comity than the sort proscribed in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986):

> Because of our concerns for comity and federalism, we thought that it was "perfectly natural for our

> cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."

Id. at 627 (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)).

The federal intrusion into state-court proceedings exemplified by this case will be repeated wherever litigants, uncertain about the scope of the FAA employment contract exclusion, file their underlying actions in state court, only to find themselves restrained from proceeding by a United States District Court exercising power under the FAA,[7] 9 U.S.C. § 3 (App. 72).

Additionally, this Court should grant a writ of certiorari to correct the widespread error of the circuit courts that have adopted the reasoning and holding of the Third Circuit's *Tenney* decision. *Tenney* is based upon a misapplication of the principle of *ejusdem generis* and a misreading of legislative history. *Tenney* reasons that the statutory phrase "any other class of workers engaged in foreign or interstate commerce" must include only classes of workers similar to those listed in the preceding phrase, "seamen" and "railroad employees," 9 U.S.C. § 1. However, the Third Circuit should not have applied the rule of *ejusdem generis*, because the meaning of the general phrase "any other class of workers" is clear. As this Court has held, " ' "[t]he rule of *ejusdem generis* . . . is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." ' " *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980) (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)). The rule applies, if

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[7] An example of the uncertainty surrounding this issue may be seen in the Sixth Circuit. In *Asplundh*, 71 F.3d 592, a District Judge had relied on *Willis*, 948 F.2d 305, which clearly held that the FAA excludes from its coverage all employment contracts. The panel in *Asplundh* declared the holding of *Willis* to be dicta and ruled that the FAA employment contract exclusion has the narrow scope defined by the Third Circuit in *Tenney*.

at all, only when the meaning of the general clause cannot be reasonably ascertained without reference to the specific list that precedes it. *See United States v. Aguilar*, 115 S. Ct. 2357, 2369 (1995) (Scalia, J., concurring in part and dissenting in part) (illustrating the rule by reference to a statute that covers "fishing rods, nets, hooks, bobbers, sinkers, and other equipment"). Where the general language, standing alone, plainly covers a broad class of identifiable objects, that meaning must control absent "evidence of congressional intent over and above the language of the statute." *United States v. Powell*, 423 U.S. 87, 90 (1975). The rule of *ejusdem generis* does not apply where "other controlling rules of construction" – like the plain meaning rule – dictate a broad reading of the statute. 2A N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 47.22, at 210 (5th ed. 1992).

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), this Court addressed an almost identical issue of statutory construction. The statute in *Harrison* provided for judicial review of a specific list of administrative actions or "any other final action." *Id.* at 587. The respondents argued that, under the doctrine of *ejusdem generis*, "the phrase, 'any other final action,' should be read . . . to reach . . . only those [final actions] similar to the actions under the specifically enumerated provisions that precede the catchall phrase." *Id.* This Court disagreed, stating that it could "discern no uncertainty in the phrase, 'any other final action.' " *Id.* at 588. The Court was impressed, in particular, with the fact that the general clause began with the words " '*any* other,' " ruling that this "expansive language" made it "inappropriate to apply the rule of *ejusdem generis* in construing [the statute]." *Id.* at 588-89. As the Court concluded: "[W]e agree with the petitioners that the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." *Id.* at 589.

In this case, the general language is equally broad and clear. As in *Harrison*, the general clause is proceeded by the phrase "any other," thus signaling an intent to cover the full

range of workers engaged in interstate commerce, of which the specific list, preceding the general, is merely an illustration. The canon of *ejusdem generis* permits the specific to elucidate the general, not to trump it. The language within the general clause must be construed "to mean exactly what it says." *Id.* at 589.

In any event, even assuming *arguendo* that the rule of *ejusdem generis* has some applicability in this case, the canon is "no more than an aid to construction." *United States v. Turkette*, 452 U.S. 576, 581 (1981). It does not apply where the context, history, or purpose of the statute indicate that the " 'general words were not used in the restrictive sense suggested by the rule.' " 2A N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 47.22, at 210 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 88-89 (1934)); *see Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n.*, 499 U.S. 117, 129 (1991); *Gooch v. United States*, 297 U.S. 124, 128 (1936).

Here, there are compelling indications that Congress intended a broad reading of the exclusion. First, the context strongly suggests that Congress intended the exclusion to extend to the full reach of congressional power under the commerce clause. As Judge Maris noted in *Tenney*, the FAA "was drawn and passed at a time when the concept of Congressional power over individuals whose activities affected interstate commerce had not developed to the extent to which it was expanded in the succeeding years." 207 F.2d at 453. The term "interstate commerce," when used by Congress, "had been construed by the Supreme Court to include only employees engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Id.* (citing *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part*, *U.S. v. Darby*, 312 U.S. 100 (1941)). Given that context, it is clear that the reference to seamen and railroad employees was not intended to restrict the scope of the exclusion. It was simply an effort to illustrate the types of workers who were

then within the reach of Congress' power under the Commerce Clause. The point was not to limit the exclusion to a small subset of workers in interstate commerce but to cover broadly all classes of workers then subject to the reach of the commerce clause.

Tenney suggested that it would undermine congressional intent to expand the exclusion beyond the narrow construction of interstate commerce that Congress had "in mind" at the time it enacted the FAA. *Id.*, 207 F.2d at 453. In fact, quite the opposite is true. "It is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them." *Cain v. Bowlby*, 114 F.2d 519, 522 (10th Cir. 1940) *cert. denied*, 311 U.S. 710 (1940); *see, also, Pickhardt v. Merritt*, 132 U.S. 252, 256 (1889); *Newman v. Arthur*, 109 U.S. 132, 137 (1883). Where "[l]egal rights and relationships" determined by a statute are modified by a subsequent change in the law, "the older legislation is construed in pari materia with the new law." 2B N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 49.02, at 3. By adopting an exclusion that covered all employment contracts then subject to Congress' power to regulate interstate commerce, Congress plainly meant broadly to exclude employment contracts from the reach of the Act. As the legal definition of regulable interstate commerce expands, so too must the exclusion or else Congress' intent in exempting all contracts of employment is defeated.[8] Locking the statute into historic notions of interstate commerce does not further Congress' original intent, it thwarts it. *See Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 123 (N.D.

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[8] It is not sensible to conclude that Congress intended to exclude from FAA coverage workers involved in the delivery of goods but not workers, like Michele Peacock, involved in the interstate delivery of capital from Great Western's California bank to its New Jersey branch office.

Miss. 1995) (stressing that at the time the FAA was passed, the language of Section 1 would have excluded "all employment contracts" given the contemporaneous understanding of the reach of congressional power under the commerce clause).

Indeed, any other ruling would be inconsistent with how courts have construed the scope of the FAA in general. Section 2 of the FAA provides the general rule for enforcement of arbitration agreements. That section applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Section 2 has been broadly interpreted in accordance with the expanding reach of congressional power under the commerce clause. *See e.g., Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1240 (D.N.J. 1994). It is both unfair and illogical to adopt an expanding notion of commerce for purposes of Section 2 coverage, while leaving the definition of regulable interstate commerce, for Section 1 purposes, in a fossilized state. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-11 (6th Cir. 1991) (citing A. Cox, *grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 599 (1954)); *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. at 122-23. Read in context, the text of the FAA strongly supports the view that Congress intended to exclude all employment contracts otherwise covered under Section 2 of the Act.

Any doubt on this point is put to rest by the legislative history of the FAA. The FAA was enacted in 1925. "There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities." *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting). The Act was originally drafted by a committee of the American Bar Association, acting upon instructions "to consider and report upon 'the further extension of the principle of commercial arbitration.' " *Id.* (quoting Forty-third Annual Meeting of the ABA, 45 A.B.A. Rep. 75 (1920)). The Section 1 exclusion was proposed by Secretary of Commerce Herbert Hoover in

response to labor's concerns that "employees would be forced into arbitration controlled by the employer." *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. at 122 (citing *Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary*, 67th Cong. 4th Sess. 14 (1923)). At a hearing on the proposed legislation, the Act's chief sponsor assured other Senators that the legislation "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." *Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary*, 67th Cong. 4th Sess. 9 (1923). On the floor of the House, Representative Graham confirmed this view of the Act's scope:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts – an agreement to arbitrate, when voluntarily placed in the document by the parties to it.
>
> * * *
>
> It creates no new legislation; grants no new rights except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 Cong. Rec. 1931 (1924). It is clear from this history that the FAA was " 'never meant to incorporate employment contracts.' " *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. at 122.

The proper focus, in construing the Section 1 exclusion, is not on the general policy favoring arbitration but on the concerns that prompted Congress to exclude a category of contracts from the Act's general prescriptions. In enacting the FAA, Congress wanted to support the use of "commercial" arbitration. It also had concerns, however, that individuals without significant bargaining power would be forced into arbitration. Congress was concerned, in particular, that a " 'good many' " employment contracts that are entered into " 'are really not [voluntary] things at all.' " *Gilmer*, 500 U.S.

at 39 (Stevens, J., dissenting) (quoting *Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary*, 67th Cong. 4th Sess. 9 (1923)). Concerned that workers, as a condition of employment, would be forced into agreeing to arbitration on the employer's "terms," *id.*, Congress chose to exclude employment contracts from the reach of the Act. *See Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 802 (10th Cir. 1995) (Jenkins, J., concurring) ("In making an exception for employment contracts [under the FAA], Congress recognized that arbitration provisions in such contracts are not really bargained for at all. Ordinarily, if a person wants a job, he must agree to the employer's terms, however onerous they may be").

The simple fact is that arbitration, in the employment context, is a tool of the employer. Few prospective employees show up for work armed with an arbitration agreement, insisting that the employer agree to mandatory arbitration as a condition of hiring. It is the employer who insists upon such arbitration, and for good reason. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after Gilmer v. Interstate/Johnson Lane Corp.*, 21 EMPL. REL. L.J. 21, 43 (Autumn 1995) (encouraging employers to use arbitration in light of evidence that "employers stand a greater change of success in arbitration" and are subjected to "smaller" damage awards). The FAA was designed to facilitate arbitration of "commercial disputes" among "merchants," not to give employers the upper hand in their dealings with employees. We urge this Court to grant certiorari and construe Section 1 broadly to exclude all arbitration agreements contained in all contracts of employment entered into by firms engaged in the interstate commerce, whether such firms be in the transport industry or not.

B. This Court Should Grant Certiorari To Resolve Conflicting Decisions In The Circuits Concerning The Validity Under The FAA Of Arbitration Agreements That Preclude Substantial Statutory Rights And Remedies.

1. This Court Should Grant Certiorari To Resolve A Conflict Between The Third And Eighth Circuits Concerning The Validity Of A Prospective Waiver Of A Judicial Forum For Resolution Of Discrimination Claims Brought Under State Law.

First and foremost, Great Western compelled Ms. Peacock to sign an "agreement" that prospectively waived her right to a jury trial, a right granted by New Jersey's Law Against Discrimination and the New Jersey Constitution.

So important did the New Jersey legislature deem the right to a jury trial under its anti-discrimination law, that within months of the New Jersey Supreme Court's ruling that such jury trials were not required, the legislature amended its statute explicitly to permit jury trials.[9] Indeed, the right to trial by jury is guaranteed by New Jersey's Constitution, N.J. Const. art. I, ¶ 9 (1973), (App. 76).

Referring to such clear expressions of state public policy, the Third Circuit in this case ruled that the FAA "preempt[s] such laws." (App. 18). Relying centrally upon *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), the Court of Appeals ruled that "Congress's intention in enacting the FAA was to provide federal court enforcement of a waiver of the right to a judicial forum respecting a state statutory claim. . . . " (App. 18). That holding runs afoul of this Court's prior

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[9] In 1989, the Supreme Court of New Jersey held that there was no right to a jury trial under the New Jersey Law Against Discrimination as then constituted. *Shaner v. Horizon Bancorp.*, 116 N.J. 433 (1989). In 1990, the legislature amended the statute to guarantee the right to a jury trial. N.J. Stat. Ann. 10:5-13; 1990 N.J. Laws c.12, § 2.

decisions and is directly at odds with a ruling of the Eighth Circuit.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the District Court had held that the employee's statutory right to a trial de novo under Title VII was foreclosed by the employee's voluntary submission of his claim to final arbitration pursuant to the union's agreement to arbitrate. The Court of Appeals affirmed. This Court, in reversing, was "unable to accept the proposition that petitioner waived his cause of action under Title VII." *Id.* at 51. The Court unanimously declared:

> [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.
>
> * * *
>
> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id. at 51-52.

While this Court noted that federal policy favors arbitration, *id.* at 46, it recognized that the Title VII scheme indicates that Congress intended federal courts to be ultimately responsible for enforcing Title VII, and deferral to arbitral decisions would conflict with that goal. *Id.* at 56. This Court concluded as follows:

> [T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

Id. at 59-60.

Given the fact that state anti-discrimination laws like New Jersey's form an integral part of the federal system enforcing Title VII, it would be anomalous were this Court to hold that a prospective waiver of a judicial forum is not enforceable under Title VII, but is enforceable for a claim brought under state discrimination laws.

In a ruling that proceeds correctly from the principles of *Alexander*, the Eighth Circuit has rejected the sweeping preemption rule adopted by the Third Circuit and has held that *Alexander* renders unenforceable a prospective waiver of a judicial forum for a state anti-discrimination claim. *Swenson v. Management Resources Int'l Inc.*, 858 F.2d 1304 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (8th Cir. 1989), *cert. denied*, 493 U.S. 848 (1989). There, the Eighth Circuit correctly determined that federal policy invalidates a prospective waiver of statutory remedies under a state anti-discrimination law just as surely as it invalidates a prospective waiver of Title VII remedies.

In *Swenson*, the plaintiff asserted claims of race and sex discrimination under the Minnesota Human Rights Act. The defendant sought to compel arbitration of the state claims. Ruling that federal policy would preclude arbitration of a race or sex claim brought under Title VII, the Eighth Circuit concluded that the same principles should apply to state remedies serving as a counterpart to Title VII." *Id.* at 1307. The Court noted that the "[p]rovisions in the text as well as in the legislative history [of Title VII] demonstrate an explicit, mixed federal-state scheme . . . and a prominent state law role." *Id.* at 1308. Specifically, Congress "intended the federal antidiscrimination system to defer to state systems where possible," by, among other things, "giving individuals access to the state courts." *Id.* at 1309. The Court concluded that because enforcement of the arbitration agreement would undermine Title VII's multi-tiered enforcement scheme, federal policy precluded arbitration of the plaintiff's state law claims. *Id.* at 1309.

Given the proliferation of arbitration agreements in the workplace, and the presence of discrimination laws granting the right to trial by jury in virtually all states, Honorable Charles R. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts*, at Appendix A-3 (2d ed. 1996), it is inevitable that the prospective waiver issue in this case and *Swenson* will repeat throughout the nation. Certiorari should be granted to provide guidance to the lower courts.

2. This Court Should Grant Certiorari To Resolve A Conflict Between The Third And Ninth Circuits Concerning The Validity Of An Arbitration Agreement That Prospectively Waives State Statutory Remedies.

The "Arbitration Agreement" Great Western compelled Ms. Peacock to sign as a condition of employment precludes the recovery of punitive damages or attorney's fees, and provides a statute of limitations half that allowed by state law.[10] In sum, the agreement stripped Ms. Peacock of rights and remedies available to her under state and federal civil rights law.

The Third Circuit improperly analyzed and answered the question posed by petitioner in this regard: Is an arbitration agreement, executed before any dispute between the parties arises, that deprives one party of substantial state and federal statutory remedies, valid under the FAA?

The Third Circuit reasoned that arbitration agreement provisions that strip away statutory remedies cannot invalidate the entire agreement, (App. 19),[11] thereby overlooking

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[10] The "Agreement" provides for a one-year statute of limitations. New Jersey decisional law allows two years for employment discrimination actions. *Montells v. Haynes*, 133 N.J. 282 (1993).

[11] The Circuit referred to the arbitrator the issue of whether or not certain waivers of statutory remedies were valid. (App. 19 and 21).

state and federal common law principles deeming void contracts in derogation of the public policy.

The starting point for the Third Circuit's analysis should have been the federal courts' obligation to find arbitration agreements to be "valid, irrevocable and enforceable *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis supplied). One state law ground for "the revocation of any contract" is the principle that an agreement in derogation of public policy is void. *See, e.g., Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281-82 (1993). This Court has recognized that an arbitral forum that prospectively deprives a party of statutory remedies is in derogation of public policy. Indeed, this Court has upheld the arbitrability of statutory claims always and only upon the premise that in arbitration all substantive rights provided by statute would be preserved:

> It is now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA . . . "[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

This Court has made clear that an arbitration agreement is enforceable only " '[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' " thereby ensuring that " 'the statute will continue to serve both its *remedial and deterrent function.*' " *Gilmer*, 500 U.S., at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (emphasis supplied.)

This "Arbitration Agreement" completely undermines the "deterrent function," *Gilmer,* of the New Jersey Law Against Discrimination and Title VII by requiring Ms. Peacock (and every other employee of Great Western) prospectively to give

up her right to recover punitive damages. Such damages are an integral part of the remedial schemes of both statutes. *See* N.J. Stat. Ann. 10:5-3 and 5-13; 42 U.S.C. § 1981a.

This "Arbitration Agreement" undermines the "remedial function," *Gilmer*, of state and federal civil rights statutes as well by requiring Ms. Peacock prospectively to give up her statutory right to attorney's fees, N.J. Stat. Ann. 10:5-27.1, if she prevails and by imposing upon her a statute of limitations half that allowed by state law.

It is well-settled that "there can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). In *Mitsubishi*, this Court made clear that if an agreement operated "as a prospective waiver of a party's right to pursue statutory remedies," the Court "would have little hesitation in condemning the agreement as against the public policy." 473 U.S. at 637 n.19. *Mitsubishi* approvingly cited several circuit cases including *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967) (holding that an agreement negotiated through the offices of an arbitrator prospectively waiving exemplary damages under the antitrust laws would be invalid on public policy grounds).

Because the agreement involved here is directly at odds with *Gilmer*, *Mitsubishi*, and *Alexander*, the Third Circuit should have declared the entire agreement void as a matter of public policy as the Ninth Circuit properly has done with regard to a nearly identical agreement in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), *cert. den.*, 116 S.Ct. 275 (1995).

In *ARCO*, a small franchisee was required by a powerful franchisor to sign an arbitration agreement that deprived the franchisee of important statutory protections under the Petroleum Marketing Practices Act ("PMPA"). In particular, the arbitration clause, in addition to requiring arbitration rather than a trial, prohibited an award of punitive damages or recovery of attorneys' fees, and reduced the statute of limitations from one year to 90 days. *Id.* at 1247-48. The court

found that the arbitration clause violated the purpose and terms of the PMPA, declared it void, and remanded the matter for trial.[12] *Id.* at 1248-49. In so ruling, the *ARCO* court reasoned as follows:

> However, the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess. This is certainly true in cases arising under the PMPA, which was enacted to shield franchisees from the gross "disparity of bargaining power" that exists between them and franchisors. If franchisees could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Id. at 1247.

As in *ARCO*, if employers are allowed to use their superior economic power over current prospective employees to exact "arbitration agreements" that eviscerate substantial statutory rights, state and federal employment discrimination law

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[12] The *Arco* court struck down the *entire* arbitration clause, rather than just the provisions prohibiting punitive damages and attorney's fees and shortening the statute of limitations, because (1) the arbitration clause was "a highly integrated unit containing three different illegal provisions;" (2) "the offensive provisions clearly represent[ed] an attempt . . . to achieve through arbitration what Congress has expressly forbidden;" and (3) "[s]uch a blatant misuse of the arbitration procedure serves to taint the entire clause." 43 F.3d at 1248-49.

will become a nullity. If Great Western is permitted to require unsophisticated, powerless employees like Michele Peacock to forfeit statutory rights as a condition of employment, most employers will eventually require the forfeiture of rights as a condition of employment, thus effectively repealing the laws that protect employees.

This Court should grant certiorari not only to resolve the conflict between the Third and Ninth Circuits with regard to the validity of arbitration agreements that restrict statutory remedies, but also to assert the continued vitality of the holding of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974), that prospective waivers of Title VII rights are invalid.[13]

3. This Court Should Grant Certiorari To Establish That An Arbitration Agreement That Precludes All Discovery Is Not Enforceable Under The FAA.

Below, the petitioner argued that the "Arbitration Agreement" at issue here was void as a matter of New Jersey public policy because it bars discovery.[14] The Third Circuit rejected that contention, citing *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), for the proposition that "less extensive, more informal discovery available in arbitral forum does not render [the] arbitral forum inadequate to vindicate

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[13] *See also, Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583-84 (6th Cir. 1995); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994); *Riley v. American Family Mut. Ins. Co.*, 881 F.2d 368, 371 n.6 (7th Cir. 1989); *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 318-19 (D.C. Cir. 1977); *United States v. Allegheny-Ludlum Indus. Inc.*, 517 F.2d 826, 856-57 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

[14] The Supreme Court of New Jersey, ordering disclosure of an employer's investigative file in a discrimination case, has held that New Jersey has a " 'strong public policy favoring *disclosure* and eradication of discriminatory treatment in employment.' " *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524 (1997) quoting *Dixon v. Rutgers University*, 110 *N.J.* 432, 451 (1988) (emphasis supplied).

statutory rights." (App. 19 to 21). In so ruling, the circuit misread *Gilmer* in a manner that promises to profoundly undermine federal and state statutory rights.

No authority need be cited for the proposition that without *some* discovery, employees in federal and state discrimination cases will simply be unable to vindicate their statutory rights. In a discrimination case, the plaintiff has the burden of proof, but the defendant is typically in a superior informational position, having access to employee-witnesses, personnel files, statistical data, records of prior discrimination cases against the company, and other such materials. Accordingly, to level the playing field, courts have allowed civil rights plaintiffs a broad scope of discovery. Indeed, this Court, in requiring more precise proofs of causation in disparate impact cases has assumed that such plaintiffs in such cases will be afforded liberal discovery:

> Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988), are required to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force. . . .

Wards Cove Packaging Company, Inc. v. Antonio, 490 U.S. 642, 657-8 (1989).

Liberal discovery is especially appropriate in employment discrimination cases "[b]ecause employers rarely leave a paper trail – or 'smoking gun' – attesting to a discriminatory intent" and therefore "disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of various explanations offered by the employer," *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

This Court has recognized that an employee asserting a discrimination claim "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons" offered by employers in justification of actions taken against an employee "were in fact a coverup for . . . discriminatory action," *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 805 (1973).

Great Western's no discovery, no depositions rule (App. 69) runs counter to the foregoing authority. Contrary to the Third Circuit's reasoning, this Court in *Gilmer* required far more liberal discovery in discrimination action.

There, this Court expressly determined that the New York Stock Exchange provided discovery sufficient to vindicate statutory rights ruling that:

> [t]here has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas [citations omitted] will prove insufficient to allow ADEA claimants, such as *Gilmer*, as fair opportunity to present their claims.

Id. 500 U.S. at 31.

The Third Circuit's equation of the discovery permitted by Great Western with that approved in *Gilmer* is wide of the mark. Great Western's "Binding Policy" offers no provision

allowing an employee to inspect company documents or interview company witnesses.[15] All an employee receives are "lists" of documents and witnesses the company has selected for use at the hearing, (App. 69).

By approving Great Western's arbitration agreement, the Third Circuit has provided a road map for employers who wish to avoid enforcement of federal and state discrimination laws. All they need do is force their employees, on pain of termination, to sign an arbitration agreement, effectively a contract of adhesion, that provides no meaningful discovery and strips away important statutory remedies. In the arbitral setting thus created, the employer will almost always prevail no matter how meritorious the case, and, on those rare occasions when the employee wins, the arbitrator will award no punitive damages and no attorneys fees. Discrimination thus becomes a modest cost of doing business.

This Court should grant certiorari to prevent such evisceration of our nation's civil rights laws. This Court should rule that an arbitration agreement that precludes meaningful discovery is invalid under the Federal Arbitration Act for purposes of resolving statutory claims.

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[15] Obviously, while the employee has no access to such materials, Great Western may at will examine its own personnel files and interview its employees.

CONCLUSION

This Court should grant this Petition for a writ of certiorari.

Respectfully submitted,

SMITH MULLIN, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052
(201) 736-7033
Counsel for Petitioner

NEIL MULLIN
Counsel of Record

Filed April 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5273

GREAT WESTERN MORTGAGE CORPORATION

v.

MICHELE PEACOCK

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 96-628)

Argued Monday, December 16, 1996

BEFORE: STAPLETON, ROTH and GARTH, *Circuit Judges*

(Opinion filed April 3, 1997)

Neil M. Mullin, Esq. (Argued)
Christopher P. Lenzo, Esq.
Smith Mullin, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052

Attorneys for Appellant

Roger J. Hawke, Esq. (Argued)
Elizabeth B. Lynch, Esq.
Brown & Wood, LLP
One World Trade Center
New York, New York 10048

Attorneys for Appellee

OPINION OF THE COURT

GARTH, *Circuit Judge*:

This appeal presents the issue of whether a district court, pursuant to the Federal Arbitration Act (FAA),[1] should compel arbitration of a sexual harassment claim based on New Jersey's Law against Discrimination.

On August 8, 1994, the plaintiff, Michele Peacock, a resident of New Jersey, applied for work as a mortgage consultant at defendant Great Western Mortgage Corporation, which was incorporated in Delaware. At the time of her application, but before she had been employed, she signed a Certification agreeing:

> to submit any dispute related to my employment, or the termination of my employment, to final and binding arbitration (thus waiving any right to pursue any other administrative and/or legal proceeding), and, as a condition of my employment, **I agree to sign Great Western's Arbitration Agreement upon commencement of my employment, and to abide by the Arbitration Agreement and Great Western's Binding Arbitration Policy and Procedures.**[2]

On September 1, 1994, Great Western employed Peacock and she began work. Thereafter, on September 26, 1994, Peacock signed a more detailed form entitled "Great Western Financial Corporation and Affiliates Binding

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[1] 9 U.S.C. § 1 *et seq.*

[2] App. at 22a (emphasis in original).

Arbitration Agreement" (Arbitration Agreement). The Agreement required arbitration of all employee discrimination claims, including statutory claims and claims based on sex. It provided for binding arbitration in all employment-related disputes, including:

> all civil claims, excluding claims under the Workers' Compensation Act, but including, and not limited to, claims of employment discrimination on the basis of race, sex, age, religion, color, national origin, disability and veteran status (including claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities.[3]

The Agreement further provided that arbitration had to be initiated within one year after an event giving rise to a dispute, and that an employee involved in an arbitration could be represented by an attorney, at her own expense. Finally, the Agreement provided that the arbitrator could not award punitive or exemplary damages.

According to Peacock, sometime after she commenced employment she became the object of sexual harassment. She alleges that her supervisor at Great Western, William Belott, made unwelcome advances toward her and threatened reprisal in the event that she

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[3] *Id.* at 32a.

discussed his behavior with others.[4] In addition, she claims that the Branch Manager, Alice Morris, knew of Belott's advances but failed to take any action against him, and that Morris herself made inappropriate comments and suggestions.[5]

Peacock retained counsel to represent her in pressing a claim for sexual harassment.[6] In May 1995 her attorney made Great Western aware of Peacock's complaints, and in August 1995 Great Western responded that after conducting an investigation, it "was unable to confirm" her allegations. Great Western advised Peacock that if she was not satisfied with the results of Great Western's investigation, she could "file a claim in arbitration, pursuant to the Binding Arbitration Agreement . . . dated 9/26/94." On August 23, 1995, Peacock's counsel filed for arbitration on Peacock's behalf.

Pursuant to the Arbitration Agreement, Great Western submitted the matter to JAMS/ENDISPUTE (JAMS), and on October 9, 1995, JAMS confirmed that it had received the request to arbitrate.[7] In the interim, however,

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[4] See Complaint and Jury Demand in *Michele Peacock v. Great Western Mortgage Corporation et al.*, Superior Court of New Jersey Law Division: Essex County, No. L-13441-95, App. at 54a-56a.

[5] *Id.* at 56a-57a. Morris is alleged to have told Peacock, "If you aren't getting any deals from your realtors, walk in with your skirt over your head; I bet you get business then," and to have ordered Peacock to kiss an appraiser. *Id.*

[6] Great Western asserts that Peacock retained the law firm Hannoch Weisman in January of 1995.

[7] App. at 140a.

Peacock retained another attorney, whose fees, apparently, were lower than the fees charged by Hannoch Weisman. On October 25, 1995, her new counsel informed Great Western that "we hereby withdraw all settlement offers and that we do not consent to arbitration of this matter."

On November 8, 1995, pursuant to the New Jersey Law against Discrimination (NJLAD), N.J.S.A. 10:5-1 *et seq.*, Peacock filed a complaint against Great Western and supervisors Belott and Morris. In the complaint, which was filed in the Superior Court of New Jersey, Peacock sought money damages as well as declaratory and injunctive relief. In its answer, filed on January 30, 1996, Great Western responded, *inter alia*, that the dispute came within the purview of a binding arbitration agreement and that Peacock had waived any right she might have had to a trial.

On February 1, 1996, Great Western filed a petition under the FAA in the District of New Jersey to compel arbitration and to stay the state proceedings. On April 9, 1996, the district court issued an Order compelling arbitration and granting the stay.[8]

Peacock appeals from that order, contending 1) that the FAA does not apply to employment contracts; 2) that she did not waive her rights under NJLAD; 3) that because Great Western's Arbitration Agreement would deprive Peacock of a two-year statute of limitations, a right to discovery, and punitive damages, it is void as a

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[8] *Great Western Mortgage Corp. v. Peacock*, No. 96-0268, Order of April 9, 1996 (D.N.J. 1996).

matter of public policy; 4) that Great Western waived any right to arbitration that it might have had; and 5) that the district court erred in denying her motion for a jury trial under 9 U.S.C. § 4.

Great Western filed the petition to compel arbitration pursuant to 9 U.S.C. § 4, which provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

The district court had diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332, and we have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.[9] The district court's decision is subject to plenary review.[10] We affirm.

I.

Peacock argues first that the district court erred in compelling arbitration of her claim because the FAA does not apply to employment contracts. She maintains that

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[9] *Trap Rock Industries, Inc. v. Local 825, International Union of Operating Engineers, AFL-CIO*, 982 F.2d 884, 887 (3d Cir. 1992).

[10] *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1065 (3d Cir. 1995).

she falls within the scope of the exceptions to mandatory arbitration provided in the FAA.

Section 1 of the FAA provides as follows:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but *nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*[11] (emphasis added).

Peacock contends that this court has construed the FAA to exclude mandatory arbitration of employment contracts.

We cannot agree. In *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America,*[12] we held, after an analysis of the relevant legislation, that the exceptions specified in 9 U.S.C. § 1 refer only to workers

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[11] 9 U.S.C § 1.

[12] 207 F.2d 450 (3d Cir. 1953) (en banc).

actually engaged in interstate commerce.[13] *Tenney* involved an employer and employees engaged in the manufacture of goods for sale in interstate commerce. The company's employees, who were represented by a labor union, were all engaged in the manufacture of these goods and in incidental plant maintenance. The collective bargaining agreement between the company and the union contained an arbitration clause. The company, claiming that a strike by its employees violated the collective bargaining agreement, brought suit in the district court for the District of New Jersey under Section 301 of the Labor Management Relations Act. The union moved for a stay of the suit, pending arbitration under Title 9.

The district court denied the stay and refused to compel arbitration. In vacating the district court's judgment, Judge Maris, writing for this court, held that the employees were *not included* within the class of those excepted from the operation of the FAA, and hence were required to arbitrate their disputes:

> In the case before us the plaintiff's employees are engaged in the production of goods for subsequent sale in interstate commerce. Thus while their activities will undoubtedly affect interstate commerce they are not acting directly in the channels of commerce itself. They are, therefore, not a "class of workers engaged in . . . interstate commerce" within the meaning of Section 1 of title 9.[14]

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[13] *Id.* at 452.

[14] *Id.* at 453.

Peacock, in her initial brief, makes no reference to our *Tenney* decision. Rather, Peacock argues that our later case of *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[15] holds squarely that "the FAA by its own terms does not apply to employment contracts." *Pritzker*, however, was an appeal which did not involve employment contracts. Rather, it held that the asset management contracts in that case could be subjected to arbitration.[16] Hence, even if *Pritzker* sought to overrule *Tenney* – which it could not[17] – the holding of *Pritzker* has no reference to employment contracts, and hence has no bearing on the issue here.

We are satisfied that *Tenney* is still the controlling law in this Circuit as well as others. *See, e.g., Dancu v. Coopers & Lybrand*,[18] citing and following *Tenney*,[19] as well as authorities in the First, Second, Fifth, Sixth, and Seventh Circuits.[20] In addition, any number of district courts have

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[15] 7 F.3d 1110 (3d Cir. 1993).

[16] *Id.* at 1120.

[17] In this Circuit a published opinion can be overruled only by the court sitting en banc, and not by a subsequent panel decision. Internal Operating Procedure 9.1. *See also O. Hommel Company v. Ferro Corporation*, 659 F.2d 340, 354 (3d Cir. 1981) ("Yet a panel of this court cannot overrule a prior panel precedent."), *cert. denied*, 455 U.S. 1017 (1982).

[18] 778 F. Supp. 832 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992).

[19] *Id.* at 834.

[20] *See, e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 597-99 (6th Cir. 1995); *Bacashihua v. United States Postal Service*, 859 F.2d 402, 405 (6th Cir. 1988); *Miller Brewing Co. v. Brewery Workers' Local Union No. 9, AFL-CIO*, 739 F.2d 1159, 1162

enforced arbitration agreements in employment contracts.[21] As a consequence, in this Circuit, in particular, as well as in the other Circuits which follow *Tenney*, the only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed *directly* in the channels of commerce itself. Peacock does not fall within this classification. Accordingly, the district court did not err in compelling arbitration by holding that the mandatory arbitration provision of the FAA applied to Peacock's employment agreement.

II.

Peacock also argues that the Arbitration Agreement does not bind her, because she claims to have been coerced into signing it. She claims that she was unaware of the rights she was waiving, and that her waiver was involuntary. First, because at the time she applied to work at Great Western she was not informed of the provisions of the Arbitration Agreement, although she signed the Certification agreeing to abide by arbitration.

(7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); and *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

[21] *See, e.g., Powers v. Fox Television Stations, Inc.*, 923 F. Supp. 21, 23-24 (S.D.N.Y. 1996) (enforcing arbitration of claims of age discrimination brought under New York State Human Rights Law); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1242-43 (D.N.J. 1994) (enforcing arbitration of Title VII and NJLAD claims); *Cherry v. Wertheim Schroder and Co.*, 868 F. Supp. 830, 834-35 (D.S.C. 1994) (enforcing arbitration of Title VII and state law sexual harassment claims).

Second, she argues that neither the Arbitration Agreement itself, nor the employee handbook which details the agreement,[22] informed her of the New Jersey statutory rights she was being asked to waive. In her brief Peacock suggests that if she had been advised specifically of her rights under NJLAD, she would have sought legal advice.[23]

Peacock argues further that her waiver of statutory rights was coerced because she would not have been hired if she had not agreed to sign Great Western's Arbitration Agreement when she applied for a position with the company. She also charges that she would have been fired if she had refused to sign the Arbitration Agreement after beginning employment. We agree with the district court, however, that Peacock has neither alleged nor come forward with evidence to prove any facts that would constitute "grounds . . . at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

A.

In calling on the courts to resolve these matters, Peacock misunderstands the narrow scope of the inquiry involved in the arbitration process. Under the FAA the district court must be satisfied that the parties entered into a valid arbitration agreement. In conducting this inquiry the district court decides only whether there was

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[22] Great Western claims to have provided Peacock with a copy of the employee handbook, but Peacock denies having received it.

[23] Appellant's Brief at 21-22.

an agreement to arbitrate, and if so, whether the agreement is valid. 9 U.S.C. § 2. In so deciding, the district court is not to consider the merits of the claims giving rise to the controversy, but is only to determine, as we have stated, whether there is a valid agreement to arbitrate. Once such an agreement is found, the merits of the controversy are left for disposition to the arbitrator.[24] Moreover, there is a strong presumption in favor of arbitration, and doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration."[25]

B.

The district court here held that Peacock and Great Western had agreed to arbitrate, and that Peacock's claims fall within the scope of the Arbitration Agreement. The record discloses that Peacock effectively agreed to arbitration on three occasions: first, as a condition of her employment by Great Western, she agreed to sign the Arbitration Agreement upon beginning employment. Second, she then signed the Arbitration Agreement itself, after she was employed. Finally, after about one year of

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[24] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

[25] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

employment, on August 23, 1995, Peacock's attorney initiated arbitration by invoking the Arbitration Agreement, when he filed for arbitration on her behalf.

The record reveals that Peacock was a college graduate, having received a Bachelor of Science degree in Business Administration after four and one-half years of college. She does not contend that she failed to read the document containing the Arbitration Agreement, or that she had not read the arbitration provisions. Indeed, Peacock had no reservations about signing any agreements which specified necessary conditions of employment. As her Certification in lieu of Affidavit discloses, Peacock decided to arbitrate her dispute with Great Western because "I could not afford the fee that my first law firm, Hannoch Weisman, would have charged me to challenge the arbitration agreement."[26] Hence, Peacock agreed to arbitration not because of coercion on the part of Great Western, as she claims, but because of the fees that she would have been charged had she resorted to other legal proceedings. Moreover, during this period of time she was represented by counsel.

Peacock adduced no evidence and made no argument that the terms of the Arbitration Agreement were kept from her. Although her brief on appeal argues that Peacock had remained generally ignorant of the details of the Arbitration Agreement – and suggests that Great Western deliberately kept her in the dark until her "job hung in

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[26] Supplemental Certification of Michele Peacock, App. at 187a.

the balance"[27] – it is clear that she made no effort to find out the terms of the Arbitration Agreement to which she had agreed as a condition of her employment. Indeed, Peacock's attorney agreed that Peacock would have signed anything in order to be hired.[28]

At oral argument before the district court her attorney also conceded that she could have asked to see a copy of the Arbitration Agreement before she started working, and there was, and is, no issue presented that she had not read the employment papers which she had signed.[29]

C.

The true thrust of Peacock's argument is that signing the Certification and the Arbitration Agreement was a condition of Great Western's employment, which she accepted only because she was the weaker of the two parties to the employment contract.[30] Yet, as the Supreme

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[27] Appellant's Brief at 23.

[28] App. at 166a.

[29] App. at 165a. Further, the Certification in the employment application begins by instructing applicants to read the Certification carefully before signing, and to ask for assistance with any questions respecting its terms. The Certification goes on to state clearly that by agreeing to binding arbitration an applicant was "waiving any right to pursue any other administrative and/or legal proceeding." *Id.* at 22a.

[30] We note that the only condition of employment challenged by Peacock is the binding arbitration requirement. She nowhere claims that the other conditions of employment – which required Peacock, among other things, to be fingerprinted, to pass a physical examination, to take a drug

Court has made clear in *Gilmer v. Interstate/Johnson Lane Corp.*,[31] more than a disparity in bargaining power is needed in order to show that an arbitration agreement was not entered into willingly. *See also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (rejecting argument that arbitration clause was adhesive merely because there was a disparity in bargaining power).

In *Gilmer*, Gilmer had been required by his employer to register as a securities representative with the New York Stock Exchange (NYSE). His registration application required Gilmer to arbitrate controversies with respect to employment or termination of employment. When Gilmer's employment was terminated at age 62 he brought suit in district court, claiming a violation of the Age Discrimination in Employment Act of 1967. In response, his employer moved to compel arbitration, relying upon Gilmer's registration application and the FAA. Although the district court denied Gilmer's motion, the court of appeals reversed that ruling, and the Supreme Court, in turn, affirmed the court of appeals. The Court held that statutory claims such as Gilmer's may be the subject of an arbitration agreement and enforceable under the FAA, and that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold

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test, to agree to credit checks, to be bonded, and to allow Great Western to contact her references in the course of a background investigation – were either coerced or unenforceable.

[31] 500 U.S. 20, 33 (1991).

that arbitration agreements are never enforceable in the employment context."[32]

The Court noted that Gilmer, who was an experienced businessman, had not been coerced or defrauded into agreeing to arbitrate. Similarly, the record in this case reveals no indication that Peacock, who was a Business Administration graduate with four and one-half years of college education, was coerced or defrauded when she agreed to arbitrate any controversy that might arise out of her employment with Great Western.[33] She does not allege that Great Western misled her or concealed anything from her, and as we have recounted earlier, Peacock had effectively agreed to arbitration on three separate occasions. *See* IIB, *supra*.

The district court did not err in ruling that Peacock had willingly agreed to arbitrate under Great Western's Arbitration Agreement.

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[32] 500 U.S. at 33.

[33] The kind of "fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,' " as the Supreme Court stated the matter in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (quoting 9 U.S.C. § 2), is not present in the instant case. *See also Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("absent a showing of fraud or mental incompetence," a party to an arbitration agreement will be held bound to its terms).

III.

Nor is there merit to Peacock's claims that New Jersey's public policy, as expressed in NJLAD,[34] is offended by requiring her to arbitrate her sexual harassment claim. Peacock argues that New Jersey public policy is expressed clearly in NJLAD, and that because attorney's fees, a two-year statute of limitations, discovery, and punitive damages are all available under NJLAD, any agreement like the Arbitration Agreement which prospectively deprives an employee of these rights runs counter to that public policy. She also contends that, apart from NJLAD, New Jersey's standards for establishing waiver of a jury trial are not met by the Arbitration Agreement. Peacock, accordingly, concludes that her agreement to arbitrate is unenforceable. We disagree with Peacock that the waiver embodied in the Arbitration Agreement of certain rights afforded by New Jersey law renders the Agreement unenforceable under the FAA.

First, it is evident that the FAA is meant to have a preemptive effect, albeit a narrow one. In enacting the FAA, Congress declared "a national policy favoring arbitration" and "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[35] Thus, a court considering a motion made under Section 4 of the FAA, *see* n. 25, *supra*, may be called upon to decide

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[34] New Jersey's LAD provides that practices of discrimination entailing race, creed, color, national origin, ancestry, age, sex, or affectional or sexual orientation, among others, are proscribed and actionable. N.J.S.A. 10:5-1 *et seq.*

[35] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

whether the FAA preempts some state law unfavorable to arbitration.

It is also clear that the FAA will preempt such laws. The Supreme Court, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212 (1995), *Perry v. Thomas*, 482 U.S. 483 (1987), and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), has held that arbitration agreements within the scope of the FAA may be enforced even if they conflict with state law policies that would preclude arbitration.

However, while Congress's intention in enacting the FAA was to provide federal court enforcement of a waiver of the right to a judicial forum respecting a state statutory claim, the preemptive effect of the FAA is restricted to the question of arbitrability, and as previously discussed, whether the agreement to arbitrate is valid. *See* IIA, *supra*. The "FAA preempts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). Thus, a court compelling arbitration should decide only such issues as are essential to defining the nature of the forum in which a dispute will be decided.

The FAA does not otherwise preempt state law. "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration. Since the purpose of the FAA is to ensure that agreements to arbitrate are enforced, a

court compelling arbitration should preserve the remaining disputed issues for the arbitrator to decide. Any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum. It would be anomalous for a court to decide that a claim should be referred to an arbitrator rather than a court, and then, by deciding issues unrelated to the question of forum, foreclose the arbitrator from deciding them.

Second, we note that in the absence of a state law which discourages the enforcement of arbitration agreements, no question of preemption, as such, is presented. The issue in such cases is whether a *waiver* of state law rights is enforceable under the FAA, rather than whether state law rights are themselves preempted by the FAA. The instant controversy presents such a case.

Peacock has failed to demonstrate any New Jersey policy against arbitration of claims such as hers. Accordingly, we reject her argument that the Arbitration Agreement is void as a matter of public policy. Clearly, as we just described, the waiver of a state law right to a judicial forum for the resolution of state claims is enforceable under the FAA. Thus, Peacock, by agreeing to arbitration on three occasions, effectively waived her right to a jury trial.[36] Likewise, the waiver of the state-created right that

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[36] In addition to insisting that she was entitled to a jury trial as a matter of New Jersey's public policy, Peacock also claims that she was entitled to a jury trial to determine whether the parties agreed to arbitrate. Her request is grounded on Section 4 of the FAA, which provides: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same

Peacock claims to litigation-type discovery is also enforceable under the FAA.[37]

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be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. She claims that the district court ignored her request for a jury trial.

The record clearly reveals, however, that there could be no material dispute of fact as to Peacock's having agreed to arbitrate. The arguments raised by Peacock, contending that she did not so agree, were properly discounted by the district court, and are rejected by us. Because no material dispute of fact as to her agreement was discerned by the district court – nor is any discerned by us – the district court properly denied her request for a jury trial.

In *Doctor's Associates, Inc. v. Jabush*, 89 F.3d 109, 114 (2d Cir. 1996), a party resisting a motion to compel arbitration sought a jury trial. The court ruled that a party does not become entitled to a jury trial under the FAA merely by demanding one, but bears the burden of demonstrating that there is a genuine issue as to whether there was an agreement to arbitrate. The Second Circuit held that to "establish a genuine issue entitling a party to a jury trial, 'an unequivocal denial that the agreement [to arbitrate] had been made [is] needed, and some evidence should [be] produced to substantiate the denial.' " (citing and quoting *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 7 (2d Cir. 1981)). *See also Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 983-84 (2d Cir. 1996) (party resisting arbitration does not get a jury trial merely by demanding one) (citations omitted); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) (party resisting arbitration bears "the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act," and must produce at least some evidence in support of factual allegations) (quoting *Bhatia v. Johnston*, 818 F.2d 418, 422 (5th Cir. 1987)), *cert. denied*, 506 U.S. 1079 (1993).

[37] Indeed, given that Great Western argues that informal discovery *will* be available at arbitration, there appears to be no point at issue here. Appellee's Brief at 42; App. at 66a-67a. *See*

As to the waiver of state law rights unrelated to the provision of a judicial forum, we hold only that the inclusion of such waivers in a document described as an "Arbitration Agreement" cannot be asserted to avoid the *arbitration* agreed to therein. Rather, the party challenging the validity of such waivers must present her challenge to the arbitrator, who will determine the validity and enforceability of the waiver of asserted state law rights. Thus, here we leave it to the arbitrator to determine whether Peacock has waived her right to attorney's fees[38] or to a two-year statute of limitations.[39]

We also do not rule on whether Peacock has waived her right to punitive damages under NJLAD – a waiveable state right not preempted by the FAA. The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard. Thus, availability of punitive damages cannot enter into a decision to compel arbitration. NJLAD provides that a victim of unlawful discrimination may be awarded punitive damages, but the issue of whether this right has been waived, *see Swarts v. Sherwin-Williams Co.*, 581 A.2d 1328, 1331 (N.J. Super. Ct. App. Div. 1990), is separate and

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Gilmer, 500 U.S. at 31 (less extensive, more informal discovery available in arbitral forum does not render arbitral forum inadequate to vindicate statutory rights).

[38] Peacock asserts that NJLAD's provision for attorney's fees makes the Arbitration Agreement inconsistent with New Jersey public policy. Great Western has acknowledged in this proceeding, however, that the Arbitration Agreement authorizes the arbitrator to award counsel fees.

[39] Peacock actually filed her claim within the one-year period provided for in the Arbitration Agreement.

apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide. *See Mastrobuono,* 115 S.Ct. 1212 (1995).

IV.

Finally, we are obliged to address one last argument made by Peacock. Peacock argues that, for two reasons, Great Western had waived its right to arbitrate. First she asserts that Great Western breached the Arbitration Agreement by failing to submit her claim to JAMS within ten days after receiving it from her.[40] In light of the fact that we are affirming the Order of the district court compelling arbitration, the issue of whether Great Western used its best efforts to commence arbitration in a timely fashion is for the arbitrator to determine.[41]

Her second claim is that Great Western, by failing to seek another arbitrator after JAMS refused to arbitrate the dispute,[42] waived its right to seek arbitration.

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[40] Great Western's Arbitration Policy provides that Great Western, within ten business days of receiving a demand for arbitration, should "use its best efforts to commence arbitration proceedings by submitting the dispute to the Judicial Arbitration & Mediation Services ("J.A.M.S.") or, if applicable, a comparable arbitration service." App. at 66a.

[41] Peacock's initial request for arbitration was made in a letter dated August 23, 1995. On September 7, 1995 – ten business days later – Great Western indicated to Peacock's prior counsel that the matter had been forwarded to Great Western's Legal Department for processing.

[42] According to Peacock, Great Western's arbitration policy failed to meet JAMS's standards of procedural fairness, and JAMS refused to accept her case for arbitration. Peacock points to the following statement of JAMS standards, in particular:

This argument, which is tantamount to claiming that Great Western waived its right to compel arbitration, is without merit. Peacock adduces no evidence that would allow us to find that Great Western had waived its right to compel arbitration. Courts deciding whether a party has waived a right to compel arbitration must make an initial determination as to whether the conditions of waiver have been met, and waiver under the FAA is not to be lightly inferred.[43]

Even if we were to accept Peacock's argument that Great Western failed to request a second arbitrator after JAMS refused to accept arbitration, Peacock did not establish waiver. Peacock provides no record evidence either of the date on which JAMS refused to arbitrate, or of the date on which Great Western was informed of JAMS's refusal to arbitrate her claim.

"These minimum standards for employer-wide arbitration procedures are:

1. The rights and remedies that would otherwise be available to an individual under applicable federal, state or local law should remain available under the arbitration clause, unless the individual employee would retain the right to pursue the unavailable remedies in court. We are particularly concerned that the clause maintains the right to try to win exemplary damages (e.g., punitive damages, which the Civil Rights Act of 1991 allow [sic] as available damages in certain circumstances; and, double damages for 'willful' conduct under the federal age discrimination statutes), but only if such damages are available under the relevant law." Appellant's Brief at 33-34.

[43] *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068 (3d Cir. 1995) (citations omitted).

Moreover, the record reveals that JAMS's refusal to arbitrate came long after Peacock herself withdrew the matter from arbitration,[44] and that Great Western did attempt to secure another arbitrator.[45] Thus, while Peacock fails to indicate either precisely when JAMS refused to arbitrate, or when that knowledge was made known to Great Western, it was not until February 1996 that Peacock's second attorney certified that JAMS had made him aware of its policies just several weeks earlier.[46] Peacock, of course, had by that time, long since withdrawn her claim from arbitration by her counsel's letter of October 25, 1995.

In other words, the arbitration process stalled neither because JAMS refused to arbitrate, nor because Great Western waived arbitration, but because Peacock refused to continue the arbitration process. Thus, no inference can be drawn that Great Western had waived its right to compel arbitration.

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[44] Certification of Neil Mullin, App. at 90a.

[45] Great Western's counsel, just two days after the district court Order compelling arbitration of Peacock's claim, informed Peacock's counsel that in light of JAMS's refusal to arbitrate, and pursuant to Paragraph 3 of the Arbitration Agreement, the parties were required to select a new arbitrator. Letter, April 11, 1996, Record Ex. B.

[46] The Certification of Peacock's attorney, Neil Mullin, dated February 26, 1996, states: "Several weeks ago, I was advised by a Mr. Elston of JAMS/Endispute that the Great Western 'arbitration policy' and the alleged 'arbitration agreement' between Michele Peacock and Great Western failed to meet JAMS/Endispute's minimum standards. Mr. Elston advised me that consequently, JAMS/Endispute would not entertain arbitration in this matter." App. at 90a.

Next, the record makes clear that Great Western's response was always to insist that the only forum in which Peacock's complaints could be heard was the arbitral forum. In fact, in response to the letter of May 18, 1995, in which Peacock's allegations of sexual harassment were first made known to Great Western, Great Western advised Peacock that she could bring her claim to an arbitrator.[47] Once Peacock filed her claim and then withdrew from arbitration, Great Western was consistent in preserving its right to an arbitral forum. Thus Great Western, as its brief on appeal demonstrates, informed JAMS of its intention to preserve its right to arbitration:

> . . . Peacock initiated the arbitration on August 25, 1995. . . . On October 25, 1995, her new counsel purported to rescind all three arbitration agreements. . . . On November 8, 1995, Peacock filed suit against Great Western in New Jersey Superior Court and resisted all efforts to compel arbitration. . . .
>
> Upon learning it had been sued, Great Western sent a letter to JAMS/Endispute, dated December 6, 1995, advising it that Peacock was now refusing to arbitrate. Great Western stated in its letter that:
>
> > The defendants will respond to this lawsuit and assert the enforceability of the Arbitration Agreement. However, until such time as the enforceability of the Arbitration Agreement is resolved, JAMS/ENDISPUTE need not take any action on this file.[48]

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[47] App. at 44a.

[48] Appellee's Brief at 43-44 (citations omitted); Supplemental Appendix, annexed thereto, at 7.

Indeed, Great Western attempted to preserve its right to an arbitral forum by seeking to compel arbitration in state court[49] as well as in federal court. Moreover, after becoming aware of JAMS's refusal to arbitrate Peacock's claim, Great Western notified Peacock's counsel of the need to refer the dispute to another arbitration service.[50]

Given the burden that Peacock bears in demonstrating waiver, and her lack of evidence in support of her assertions, we are satisfied that Great Western clearly preserved the right to refer Peacock's claim to arbitration. As we have stated, waiver is not to be lightly inferred.[51] Indeed, a party waives the right to compel arbitration only in the following circumstances: when the parties have engaged in a lengthy course of litigation, when extensive discovery has occurred, and when prejudice to the party resisting arbitration can be shown.[52]

In this case, none of these factors have been shown. Great Western did not initiate any litigation, and in response to Peacock's suit in state court, Great Western

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[49] App. at 100a.

[50] *See* n.45 *supra*.

[51] *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068 (3d Cir. 1995) (citations omitted).

[52] *Id.* at 1068-69; *Gavlik Const. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783-84 (3d Cir. 1975) (rejecting argument that party compelling arbitration waived right by filing third-party complaint, because prejudice was not shown); *Hoxworth v. Blinder, Robinson & Co. Inc.*, 980 F.2d 912, 925-27 (3d Cir. 1992) (party waived right to compel arbitration because by contesting the merits in litigation, party opposing arbitration had been prejudiced).

responded vigorously by moving for a stay of proceedings and for an order compelling arbitration in both state and federal courts. There has been no discovery initiated by Great Western, no litigation on the merits, and no prejudice which has inured to Peacock. In short, the record discloses that Great Western has not waived its right to compel arbitration of Peacock's claims.

V.

The district court's Order of April 9, 1996, which, among other provisions, compels arbitration, will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5273

GREAT WESTERN MORTGAGE CORPORATION

v.

MICHELE PEACOCK

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 96-628)

Present: STAPLETON, ROTH, and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel December 3, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 11, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: April 3, 1997

Certified as a true copy and issued in lieu of a formal mandate on May 21, 1997.

Teste: /s/ Bradford Baldus

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs Taxed in favor of the Appellee in the amount of $128.19.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING &
U.S. COURTHOUSE
50 WALNUT ST., ROOM 6076
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

April 9, 1996

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

(Filed Apr. 9, 1996)

Brian F. Amery, Esq.
BRESSLER, AMERY & ROSS, P.C.
325 Columbia Turnpike
Florham Park, NJ 07932

BROWN & WOOD
One World Trade Center
New York, NY 10048-0557
Attorneys for Petitioner

Neil Mullin, Esq.
SMITH MULLIN, P.C.
200 Executive Drive
Suite 155
West Orange, NJ 07052-3377
Attorneys for Defendant

Re: Great Western Mortgage Corporation
v. Michele Peacock
Civil Action No. 96-0628 (NHP)

Dear Counsel:

This matter comes before the Court on a Petition to Compel Arbitration and on an Order to Show Cause why a concurrent state court action should not be stayed pending resolution of the instant matter in this Court. The motion is brought by petitioner Great Western Mortgage Corporation ("Great Western"). Respondent, Michele Peacock ("Peacock") has opposed the motion on the grounds that the Court should abstain from exercising its jurisdiction and also that, assuming the Court does not abstain, Great Western's Petition to Compel Arbitration should be denied. Having reviewed the submissions of the parties, and having heard argument in the matter on February 26, 1996, the Court shall grant petitioner's motion and compel arbitration.

Factual Background

On August 9, 1994, Peacock applied for a position as a mortgage loan consultant at Great Western's Livingston, New Jersey office. As part of her application for employment, Peacock certified that she understood Great Western's policy of requiring the arbitration of employment disputes – should they arise – and agreed to submit any disputes relating to her employment to binding arbitration. Agreeing to a such [sic] clause was in fact a condition of Peacock's employment. (Morris Affidavit, Exhibit A, at 2). Essentially, in so doing, Peacock agreed that she would sign Great Western's binding arbitration agreement and abide by Great Western's arbitration policies

and procedures should she secure employment with petitioner. On August 17, 1994, Great Western offered Peacock a job to commence September 1, 1994 (Morris Affidavit ¶ 5). Great Western did not provide Peacock with a copy of the Arbitration Agreement itself or the Arbitration Policy prior to the commencement of her employment. (Certification of Neil Mullin, Exhibit A).

On or about September 8, 1994, Great Western furnished Peacock with the various forms which had to be completed by her as a condition of her employment. These included the Arbitration Agreement. (Morris Affidavit, ¶ 7). Peacock returned the Arbitration Agreement, signed, to Great Western on September 26, 1994. (Morris Affidavit, ¶ 8).

The Arbitration Agreement requires its signatories to submit to binding arbitration for "[a]ny and all disputes giving rise to claims for civil damages or other civil remedies, which involve [the signatory's] employment." (Morris Affidavit, Exhibit E). Moreover, the Arbitration Agreement provides

> 4. This agreement is intended to cover all civil claims . . . including, and not limited to, claims of employment discrimination on the basis of race, sex, age, religion, color, national origin, disability and veteran status . . . , claims based on public policy, statutory claims and claims against individuals or other entities.

(Morris Affidavit, Exhibit E).

In or around January of 1995, petitioner lodged a complaint with Great Western alleging sexual harassment. Great Western initiated its own internal grievance procedure, but found that it was unable to confirm Peacock's allegations of sexual harassment. As such, Great Western informed Peacock that she was free to commence arbitration pursuant to the Arbitration Agreement. (Hussey Affidavit, ¶¶ 2 through 4, and Exhibits A and B). On August 23, 1995, Peacock – through her attorneys, HANNOCH, WEISMAN – served Great Western with a demand for arbitration. (Hussey Affidavit, Exhibit C). In or around October of 1995, Peacock discharged HANNOCH, WEISMAN as her counsel and retained her present counsel. For reasons not clear on the present record, the demand for arbitration was withdrawn. Instead, on November 8, 1995 Peacock filed a Complaint against Great Western and others in the Superior Court of New Jersey, Law Division, Essex County. Peacock's State Court Complaint seeks money damages for sexual harassment under the New Jersey Law Against Discrimination ("LAD"), a declaratory judgment that Great Western's arbitration policy is void because it violates the LAD by denying employees the substantive rights to jury trial, punitive damages, attorneys' fees, and a two-year (2) statute of limitations, and further sought a permanent injunction prohibiting Great Western from requiring its New Jersey employees to arbitrate employment disputes pursuant to the arbitration policy. By stipulation among counsel, it was agreed that Great Western would have until January 30, 1996 to answer the complaint.

On January 29, 1996, Great Western informed Peacock's counsel that, along with its answer in the state

court action, Great Western would be filing a petition in this Court to compel arbitration under the Federal Arbitration Act ("FAA"). It was agreed at that time that a return date of forty-five (45) days hence (mid-March) should be set for that petition. On January 31, 1996, Peacock filed a Motion for Summary Judgment on Count 2 of the Complaint (seeking injunctive relief regarding Great Western's arbitration policy) in the Superior Court of New Jersey. On February 1, 1996, Great Western filed its petition to compel arbitration in this Court. Thereafter, Great Western filed its Order to Show Cause why Peacock should not be restrained from proceeding in the State Court action until this Court has had an opportunity to address the federal petition and make a determination on it. At the hearing in the instant matter, on February 26, 1996, Peacock's counsel agreed not to proceed with the summary judgment motion in the State Court action until this Court has made a determination of the instant motion.

DISCUSSION

The FAA controls this controversy to the extent that its provisions affect the instant arbitration agreement. 9 U.S.C. § 2; *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108-09 (3d Cir.), *cert. denied*, 469 U.S. 831 (1984); *Crawford v. West Jersey Health Systems*, 847 F.Supp. 1232, 1240 (D.N.J. 1994). In *Crawford*, Judge Brotman analyzed the ebb and flow of Third Circuit precedent on the issue of whether employment agreements fall within the ambit of the FAA, and concluded – correctly, in this Court's view – that they do. *Crawford*, 847 F.Supp. at 1242 (citations omitted).

When a controversy before the Court falls within the provisions of the FAA (*see, e.g., Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)), the Court is bound rigorously to enforce the parties' agreement to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Moses H. Cone Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983). Moreover, the instant case falls specifically within the FAA *vis-a-vis* the claims espoused by respondent.[1] As such, this Court is compelled to order arbitration as initially agreed to by the parties.

In this case there is an agreement to arbitrate "all civil claims" between the parties[2]; such claims have arisen; and those claims fall within the scope of the arbitration agreement. The arbitration agreement itself is governed by the FAA, which mandates arbitration of the instant claims. The Court shall, therefore, as it must, apply the FAA.

---

[1] Clearly, the FAA contemplates the arbitration of claims pertaining to LAD, such as those raised by respondent. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-35 (1991) (employment discrimination claims arbitrable under the FAA); *Crawford, supra*, 847 F.Supp. at 1242-43 n. 13 (citations omitted) and *Steck v. Smith Barney, Harris Upham & Co., Inc.*, 661 F.Supp. 543, 548 (D.N.J. 1987) (ADEA, Title VII, and NJLAD claims arbitrable).

[2] The fact that respondent was compelled to sign the Arbitration Agreement is not offensive to public policy or to the governing law, despite her arguments to the contrary. *See generally Gilmer, supra*, 500 U.S. at 32-33; *Steck, supra*, 661 F.Supp. at 545.

Respondent asks that the Court abstain under the *Younger v. Harris,* 401 U.S. 37 (1971), doctrine of abstention. Abstention in this case, however, would be inappropriate in light of the Supreme Court policy that abstention only be practiced in the rarest of circumstances. The mere existence of a concurrent parallel action in state court does not usurp the Congressional intent that parties who have agreed to arbitrate their differences be, under the FAA, ushered *post haste* into the appropriate arbitral forum. *Moses H. Cone, supra,* 460 U.S. at 22. Moreover, application of *Moses H. Cone* forbids abstention in the instant case. *See* 460 U.S. at 19-28. Ergo, the doctrine of abstention is inapplicable here.

CONCLUSION

Because the FAA mandates the arbitration of this dispute, the Court shall send the matter to the forum initially opted for by the parties: arbitration. The Court shall retain jurisdiction over the matter; the Court shall order the parties to refrain from further proceedings in the concurrent state court action; and this matter shall be administratively terminated during the pendency of the arbitration proceedings.

An appropriate Order accompanies this Letter Opinion.

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GREAT WESTERN MORTGAGE CORPORATION, Plaintiff, v. MICHELE PEACOCK, Defendant.	CIVIL ACTION NO. 96-0268 HON. NICHOLAS H. POLITAN **ORDER** (Filed Apr. 9, 1996)

THIS MATTER having come before the Court on motion by the petitioner Great Western Mortgage Corporation to compel arbitration in the above captioned matter; and the Court having considered the submissions of the parties; and the Court having heard argument in the matter on February 26, 1996, and having reserved decision; and for good cause shown as set forth in the accompanying Letter Opinion;

IT IS on this 9th day of April, 1996,

ORDERED that petitioner's motion to compel arbitration in this matter is **GRANTED**; and it is further

ORDERED that the parties in the above captioned matter submit their claims to binding arbitration; and it is further

ORDERED that the parties are **RESTRAINED FROM PROCEEDING** in the concurrent state court action; and it is further

ORDERED that this Court shall **RETAIN JURISDICTION** over this matter; and it is further

ORDERED that this matter is **ADMINISTRATIVELY TERMINATED.**

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5273

GREAT WESTERN MORTGAGE CORPORATION

v.

MICHELE PEACOCK
Appellant

(N.J. Civ. No. 96-628)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and GARTH, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: May 13, 1997

LD/cc: Neil M. Mullin, Esq.
Robert J. Gregory, Esq.
Cliff M. Palefsky, Esq.
Robert E. Williams, Esq.
Roger J. Hawke, Esq.

SMITH MULLIN, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052
(201) 736-7033
Attorneys for Plaintiff

MICHELE PEACOCK, Plaintiff, v. GREAT WESTERN MORTGAGE CORPORATION, WILLIAM BELOTT and ALICE MORRIS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. L - 13441-95 CIVIL ACTION **COMPLAINT AND JURY DEMAND**

Michele Peacock, residing at 9 Pitcairn Road, Livingston, New Jersey in the County of Essex, in the State of New Jersey, alleges as follows:

COUNT ONE

1. On or about September 1, 1994, Michele Peacock became employed by the defendant Great Western Mortgage Corporation ("Great Western") as a mortgage loan consultant.

2. The defendant Great Western is a corporation of the State of Delaware with headquarters at 9301 Corbin Avenue in Northridge, California.

3. During all times relevant to this cause of action, the plaintiff was employed at Great Western's branch office at 30 West Mount Pleasant Avenue, Livingston, New Jersey.

4. At all times relevant to this cause of action, defendant Alice Morris, residing in the State of New Jersey, was Branch Manager of the aforesaid Great Western Office in Livingston, New Jersey.

5. At all times relevant to this cause of action, defendant William Belott, residing at [sic] in the State of New Jersey, supervised the plaintiff at the aforesaid Great Western Office in Livingston, New Jersey.

6. As detailed in the following paragraphs during the period of her employment at Great Western, the plaintiff was harassed on account of her gender by defendant supervisor Belott.

7. Defendant Belott frequently made unwelcome comments to plaintiff about her physical appearance.

8. Defendant Belott, while driving with plaintiff on a Great Western work assignment, requested that plaintiff sleep with him in a hotel room.

9. During the period he supervised the plaintiff, defendant Belott was threatening and over-bearing. Defendant Belott told plaintiff that his family was involved with the Mafia and that one of his cousins was a "hit man." He expressed anger at plaintiff if she sought advice from others at Great Western and told plaintiff that he wanted her to be dependent upon him.

10. Defendant Belott pressed plaintiff for details of her personal life unrelated to her work at Great Western.

11. In or about December of 1994, plaintiff, in the course of her employment with Great Western, attended a convention in Atlantic City, New Jersey.

12. Defendants Belott and Morris also attended that convention.

13. At the convention, defendant Belott propositioned plaintiff and sought to have him share his hotel room.

14. At the convention, defendant Belott refused to allow plaintiff out of his presence.

15. After the aforesaid incidents at the Atlantic City convention, defendant Belott appeared, uninvited, at plaintiff's residence on at least two occasions.

16. Defendant Belott repeatedly expressed infatuation with the plaintiff at Great Western offices. His behavior, in that regard, was overbearing and oppressive.

17. Defendant Belott told plaintiff he intended to buy her lingerie for Christmas.

18. Defendant Belott invited plaintiff to join him in a closet at work in order to engage in sexual activity.

19. Defendant Branch Manager Morris was aware that defendant Belott sexually harassed the plaintiff.

20. Defendant Branch Manager Morris condoned and ratified defendant Belott's aforesaid conduct.

21. Defendant Branch Manager Morris failed to take any remedial action against defendant Belott.

22. Defendant Branch Manager Morris told plaintiff and other women in her office, "If you aren't getting any

deals from your realtors, walk in with your skirt over your head; I bet you get business then."

23. Defendant Branch Manager Morris required plaintiff to kiss an appraiser, Mark Ferguson. When plaintiff refused, defendant Morris stated "O.K., then when you need a favor you may not get one."

24. Defendant Great Western's offices were permeated with sexual harassment. A Great Western Mortgage Loan Consultant, John Hahn, told plaintiff to sit on the lap of another male consultant and kiss him.

25. All defendants are or were employers of the plaintiff within the terms of *N.J.S.A.* § 10:5-5(e).

26. During all times relevant to this cause of action, plaintiff was an employee of the defendants within the terms of *N.J.S.A.* § 10:5-5(f).

27. Defendants, by their aforesaid actions discriminated against the plaintiff on the basis of her gender in violation of *N.J.S.A.* 10:5-12(a).

28. The actions of defendants Morris and Belott were undertaken within the scope of their employment by defendant Great Western; Great Western is liable to the plaintiff under the doctrine of *respondeat superior.*

29. Plaintiff and her counsel brought the actions of defendants Morris and Belott to the attention of Great Western officers at Great Western's corporate headquarters, but Great Western's upper management failed effectively to investigate or remediate the sexual harassment described herein.

30. Defendants' sexual harassment of plaintiff and failure to investigate or remediate said harassment has proximately caused plaintiff severe emotional distress, substantial economic loss and damage to her reputation.

WHEREFORE, plaintiff demands judgment against all defendants jointly and severally for compensatory and punitive damages, reasonable attorneys fees and costs as well as interest.

COUNT TWO

31. Plaintiff repeats and realleges the allegations of Count I as if fully set forth herein.

32. Defendant Great Western hired plaintiff on or about September 1, 1994.

33. Thereafter, on September 26, 1994, Great Western required plaintiff to sign a "Binding Arbitration Agreement," ***Exhibit A,*** hereto, or be subject to immediate discharge.

34. The aforesaid "Agreement" was given to plaintiff without explanation of her legal rights.

35. Defendants did not advise the plaintiff that she had the right to consult a lawyer concerning said "Agreement."

36. The "Agreement" was in very fine type, designed to be illegible to the reader.

37. The "Agreement" was intended by Great Western to deprive Great Western's New Jersey employees of various rights under the law including, but not limited to, their rights to a jury trial for violations of the New Jersey

Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* (hereinafter the "LAD"), their right to a two-year statute of limitations under the LAD, their right to punitive damages under the LAD, and their right to recover attorneys fees and costs under the LAD.

38. Plaintiff, and others similarly situated, did not knowingly and voluntarily execute said "Agreement," waive any rights pursuant to said "Agreemert," or agree to arbitrate employment-related disputes with defendants.

39. The aforesaid "Agreement" is void as a matter of public policy in that it violates *N.J.S.A.* 1):5-1, *et seq.* and deprives plaintiff of her rights to a jury trial as set forth in the Constitution of the State of Nev Jersey.

40. Defendants have waived whatever purported rights to arbitration they may have had under said "Agreement" by failing timely to seek arbitration of this matter.

41. The aforesaid "Aqreement" was signed under duress and lacks consideration.

42. Plaintiff will be irreparably injured if forced to arbitrate pursuant to said "Agreement."

WHEREFORE, plaintiff demands entry of judgment:

(1) Preliminarily and permanently enjoining defendant Great Western from seeking arbitration of this matter;

(2) Preliminarily and permanently enjoining defendant Great Western from relying upon said "Agreement" to require any of its New Jersey employees, past or present, to arbitrate employment-related matters; and

(3) Declaring said "Agreement" void.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

By: /s/ Neil Mullin
NEIL MULLIN, Esq.

DATED: November 6, 1995

JURY DEMAND

Plaintiff demands trial by jury with respect to all issues in this case.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

By: /s/ Neil Mullin
NEIL MULLIN, Esq.

DATED: November 6, 1995

CERTIFICATION PURSUANT TO RULE 4:5-1

Plaintiff hereby certifies that to the best of her knowledge, there is currently pending no matter related to this in either arbitration or litigation.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

By: /s/ Neil Mullin
NEIL MULLIN, Esq.

DATED: November 6, 1995

DESIGNATION OF TRIAL COUNSEL

Neil Mullin, Esq., is hereby designated as trial counsel in the within matter.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

By: /s/ Neil Mullin
NEIL MULLIN, Esq.

DATED: November 6, 1995

GREAT WESTERN GW

GREAT WESTERN FINANCIAL CORPORATION
AND AFFILIATES
BINDING ARBITRATION AGREEMENT

I Michele Peacock in consideration of my employment with Great Western Financial Corporation or an affiliate ("Great Western"), agree as follows:

1. Any and all disputes giving rise to claims for civil damages or other civil remedies, which involve my employment (or termination of employment) with Great Western shall be submitted to final and binding arbitration within the state where I am currently employed by Great Western, or where I was so employed at the time of termination. The arbitration proceedings shall be in accordance with this Agreement and Great Western's Binding Arbitration Policy and Procedures as revised from time to time, and which require that employees (both current and former) comply with Great Western Grievance Procedure Policy. Great Western's Binding Arbitration Policy and Procedures are set forth in Great Western's Human Resources Policy Manual, and are incorporated herein and made a part hereof as though set forth in full. Arbitration shall be in lieu of any and all other civil legal proceedings, including, but not limited to, administrative proceedings and lawsuits (provided, however, that neither I nor Great Western will be precluded from seeking injunctive relief through the course where such relief is warranted), and, as such, I understand and acknowledge that I am waiving any right I may have to resolve employment disputes through trial by jury. This Agreement may be enforced by a court of

competent jurisdiction through the filing of a petition to compel arbitration, or otherwise.

2. Great Western or I may initiate arbitration by so notifying the other in writing. Any notice of arbitration initiated by Great Western shall be sent to my last known residence address as reflected in Great Western's records. Notice of arbitration initiated by me shall be sent to Great Western's Human Resources Department in Chatsworth, California. Arbitration must be initiated within one (1) year of the occurrence of the event giving rise to the dispute: provided, however, that where criminal conduct is involved, arbitration to pursue civil claims arising out of such conduct must be initiated within one (1) year from the date of discovery of the conduct. Failure to initiate arbitration within the applicable one-year period shall constitute a waiver of any and all such civil claims, and any and all such civil claims shall be forever barred.

3. Within ten (10) business days after receipt of notice of arbitration, Great Western and I will attempt to agree upon a mutually acceptable arbitrator from Judicial Arbitration & Mediation Services, Inc. ("J.A.M.S.") or, if applicable, from a comparable arbitration service. The arbitration shall be conducted in accordance with Great Western's Binding Arbitration Policy and Procedures and otherwise in accordance with the rules and requirements of the arbitration service being utilized and the laws of the state in which the arbitration service is located.

4. This Agreement is intended to cover all civil claims, excluding claims under the Workers' Compensation Act, but including, and not limited to, claims of employment discrimination on the basis of race, sex, age,

religion, color, national origin, disability and veteran status (including claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities.

5. I understand that, at my expense, I have the right to hire an attorney to represent me in the arbitration. I agree to pay the fees of any witnesses testifying on my behalf at my request, and understand that witnesses who are employees of Great Western shall be "on call". I will pay the cost of any stenographic record of the arbitration hearing should I request any such record. Should I cancel or postpone an arbitration hearing, I agree to pay any cancellation or postponement fee imposed. At the conclusion of the arbitration, I agree to promptly pay any arbitration award against me; provided, however, that in no event will I be required to pay more than $250.00 for that portion, if any, of an arbitration award against me designated as administrative and/or arbitrator fees.

6. I understand and agree that the arbitrator may grant any remedy or relief that is just and equitable, but further understand and agree that the arbitrator shall not grant any award for punitive or exemplary damages, or any award for double or treble damages. I agree that the decision of the arbitrator shall be final and binding on both parties, shall be the exclusive remedy of the parties, and may be judicially enforced pursuant to applicable state law.

7. I agree that if any provision of this Agreement is found to be unenforceable to any extent, it will not affect the enforceability of the remaining provisions and the court shall enforce the affected provision and all remaining provisions to the fullest extent permitted by law.

8. This Agreement shall remain in full force and effect at all times during and subsequent to my employment with Great Western.

DATED: 09/26/94

/s/ Michele Peacock
Employee

Michele Peacock
Print Name

John Aleli (JA-8181)
YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY, STACKHOUSE, GROSSMAN & GORMLEY, P.A.
3205 Fire Road, P.O. Box 850
Pleasantville, New Jersey 08232-0850
(609) 645-2201
Attorneys for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREAT WESTERN MORTGAGE CORPORATION, Petitioner, -against- MICHELE PEACOCK, Respondent.	:	VERIFIED PETITION TO COMPEL ARBITRATION AND TO STAY STATE COURT ACTION

The Petition of Great Western Mortgage Corporation ("Great Western") under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, respectfully shows as follows:

1. Petitioner Great Western is a Delaware corporation with its principal place of business at 9200 Oakdale Avenue, Mail Stop Code N-1166, Chatsworth, California, 91311.

2. On information and belief, respondent Michele Peacock ("Peacock") is a resident of New Jersey residing at 9 Pitcairn Road, Livingston, New Jersey, 07039.

3. This Court has jurisdiction over this Petition under 28 U.S.C. § 1332, in that complete diversity of citizenship exists between the parties, and, on information and belief, the amount in controversy exceeds $50,000, exclusive of interest, attorneys, fees and costs.

4. Venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 1391. This Petition seeks to compel arbitration within the district in accordance with the arbitration agreement on which this Petition is based and the requirements of Section 4 of the FAA.

5. The FAA applies to the agreement to arbitrate on which this Petition is based in that the agreement was part of respondent's employment agreement with Great Western, which constitutes "a contract evidencing a transaction involving commerce" within the meaning of 9 U.S.C. § 2.

6. During the period from September 1994 through December 1994, respondent was employed as a mortgage loan consultant in a retail mortgage office of Great Western located at 30 West Mount Pleasant Avenue, Livingston, New Jersey (the "Livingston" office). *See* Affidavit of Alice Morris, sworn to January 26, 1996 (hereinafter "Morris Aff."), annexed hereto as Exhibit 1, ¶ 9. Respondent's duties consisted of soliciting residential mortgage loan business on behalf of Great Western and assisting in the loan application process, including the preparation of loan documentation. *Id.*

7. Great Western is an indirect, wholly-owned subsidiary of Great Western Financial Corporation ("GWFC"), a Delaware corporation with its principal place of business in Chatsworth, California. *See* Affidavit

of Joseph A. Coorough, sworn to January 26, 1996 (hereinafter "Coorough Aff."), annexed hereto as Exhibit 2, ¶ 2. Great Western is in the business of making residential mortgage loans in approximately 42 states. *Id.* All loans made by Great Western, in New Jersey and elsewhere, are funded by Great Western Bank, a Federal Savings Bank ("GWB"). When a loan is made to a borrower in New Jersey, the funds are wired to the closing agent's bank by GWB from Chatsworth, California. After mortgage loans are made, a portion of those loans are pooled by GWB and sold to financial institutions around the country. *Id.* GWB typically continues as servicer of these mortgages. All advertising, human relations issues, office supplies and equipment and payroll for Great Western's Livingston office is handled through GWB offices in California and Florida.

8. On August 9, 1994, respondent Peacock went to the Livingston office of Great Western, completed an application for employment (the "Employment Application"), Morris Aff. Ex. A, and was interviewed for employment.

9. The Employment Application included a "Certification," executed by Peacock, in which she agreed that should she be hired by Great Western, it would be a condition of employment that any and all disputes she had relating to her employment would be submitted to arbitration. The certification provided, *inter alia*:

> I understand that it is Great Western's policy to require arbitration of employment disputes, should such disputes not otherwise be resolved through Great Western's grievance procedure. I agree to submit any dispute related to my

> employment, or the termination of my employment, to final and binding arbitration (thus waiving any right to pursue any other administrative and/or legal proceeding), and, as a condition of my employment, *I agree to sign Great Western's Arbitration Agreement upon commencement of my employment, and to abide by the Arbitration Agreement and Great Western's Binding Arbitration Policy and Procedures.*

Morris Aff. Ex. A at 2 (emphasis in original, in bold type). The heading "Certification" was printed in bold type, and was followed by this instruction: "Please read carefully before signing. If you have any questions regarding the following statements, please ask for assistance."

10. At her initial interview on August 9, 1994, Peacock was also given a copy of Great Western's Employee Handbook and Benefits Summary for 1994 (the "Employee Handbook") to take home and review. Morris Aff. ¶ 4. Under the heading "Employment Policies," which appears on the first page of the table of contents of the Employee Handbook, is a subheading entitled "Conditions of Employment". The Conditions of Employment section states:

> Your employment with Great Western is contingent in part upon the following conditions:
>
> 1. Satisfactory completion of the FBI fingerprint investigation;
>
> 2. Acceptance for bonding;
>
> 3. Satisfactory verification of previous employment references;
>
> 4. Satisfactory completion of I-9 Form;

5. Completion of New Employee Orientation and New Employee Acknowledgement;

6. *Completion of Binding Arbitration Agreement (if hired after July 1, 1992);*

7. Satisfactory verification of Licenses for Professional Designation (if applicable);

8. Satisfactory completion of Formal Training (if applicable);

9. Final concurrence by our Human Resources Department[.]

Morris Aff. Ex. B at 5 (emphasis supplied).

11. The Employee Handbook also has a section entitled "Employee Relations/EEO Policies". The first three subheadings thereunder are: "Harassment," "Employee Grievance Policy" and "Binding Arbitration Policy". Under "Binding Arbitration Policy," the Employee Handbook states:

> Great Western has a policy of binding arbitration to resolve any and all employment disputes or controversies between and [sic] employee and the Company. As a condition of application and employment, individuals hired (or rehired) on or after July 1, 1992, are *required* to sign an arbitration agreement and to arbitrate employment disputes. . . . Binding arbitration provides the opportunity for employees to have employment disputes heard and resolved in a private and informal setting by an impartial person with expertise in the employment field.
>
> For further information on this policy, please refer to the Human Resources Policy Manual, Binding Arbitration Policy § 05-02-06.

Morris Aff. Ex. B at 15 (emphasis in original, in bold type).

12. On August 17, 1994, respondent Peacock returned to the Livingston office for further interviews. At that time, she was offered a position with Great Western commencing September 1, 1994. Morris Aff. ¶ 5.

13. Thereafter, Peacock was given a "welcome letter" from Great Western that again emphasized that Great Western's offer of employment to her was "contingent on the following conditions":

> Satisfactory verification of previous employment references;
> Satisfactory completion of I-9 Form;
> Acceptance for employment bonding;
> Satisfactory verification of licenses for professional designation (if applicable);
> Satisfactory completion of formal training (if applicable);
> Satisfactory completion of the FBI fingerprint investigation;
> Final concurrence by our Human Resources Department;
> *Execution of Great Western Arbitration Agreement.*

Morris Aff. Ex. C (emphasis supplied). Peacock was given another copy of the Employee Handbook with this letter.

14. On September 1, 1994, respondent reported to work at Great Western. On or about September 8, she was provided with a number of forms that she was required to complete as a condition of her employment. These included a Binding Arbitration Agreement (the "Arbitration Agreement"). Morris Aff. ¶ 7.

15. The Arbitration Agreement is an 8 1/2-by-14 inch document that comes with a duplicate attached. A full-size copy of the Arbitration Agreement form, unsigned, is attached as Morris Aff. Ex. D. The form was in respondent's possession from September 8, 1994, to September 26, 1994, when she returned the executed original to Great Western, retaining the duplicate copy for her records. A photocopy of the agreement actually signed by respondent is annexed as Morris Aff. Ex. E.

16. The Arbitration Agreement Peacock signed provided that she would submit to arbitration "[a]ny and all disputes giving rise to claims for civil damages or other civil remedies, which involve my employment. . . . Arbitration shall be in lieu of any and all other civil legal proceedings, including, but not limited to, administrative proceedings and lawsuits (provided, however, that neither I nor Great Western will be precluded from seeking injunctive relief through the courts where such relief is warranted)". Morris Aff. Ex. E.

17. In January 1995, respondent made a complaint to the Human Resources Department of Great Western that in November and December, 1994, she had been sexually harassed by certain employees of Great Western. See Affidavit of A. Hollie Hussey, sworn to January 26, 1996 (hereinafter "Hussey Aff."), annexed hereto as Exhibit 3, ¶ 2. In asserting this complaint, respondent was represented by counsel, the law firm of Hannoch Weisman. On May 18, 1995, Hannoch Weisman provided the Human Resources Department with respondent's statement of her allegations of sexual harassment. *See* Hussey Aff. Ex. A. Great Western conducted a full investigation

of that complaint in accordance with its Employee Grievance Policy. *See* Morris Aff. Ex. B at 15.

18. On August 15, 1995, the Human Resources Department sent respondent a letter stating that it could not confirm respondent's allegations of sexual harassment, but that respondent was free to proceed with arbitration of her claim in accordance with the Arbitration Agreement. Hussey Aff. Ex. B. The Arbitration Agreement provided in paragraph 2 that an employee could "initiate arbitration by so notifying [Great Western] in writing." Morris Aff. Ex. E ¶ 2.

19. On August 23, 1995, respondent, through her attorneys, initiated arbitration pursuant to paragraph 2 of the Arbitration Agreement. Respondent's attorneys sent a written request to the Human Resources Department stating that, "[a]s Ms. Peacock has exhausted the grievance procedure, *we hereby submit a request for arbitration of this matter.*" Hussey Aff. Ex. C (emphasis supplied).

20. On September 7, 1995, Great Western acknowledged its receipt of respondent's request to arbitrate, Hussey Aff. Ex. D, and on October 9, 1995, the arbitration tribunal sent both Great Western and Peacock a letter confirming that the dispute had been submitted to arbitration. Hussey Aff. Ex. E.

21. On information and belief, in or about October, 1995, Peacock discharged her counsel and retained new counsel. On October 25, 1995, Peacock's new counsel sent a letter to the Human Resources Department of Great Western purporting to withdraw respondent's prior submission of the dispute to arbitration and stating that Peacock would not consent to arbitration. Hussey Aff. Ex.

F. In so doing, respondent breached the Arbitration Agreement and defaulted on her obligations thereunder.

22. In November, 1995, respondent filed a complaint against Great Western, Alice Morris and William Belott in the Superior Court of New Jersey, Essex County, Law Division, Docket No. L13441-95 (the "State Court Action"), for sexual harassment under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § 10:5-12(a). Hussey Aff. Ex. G.

23. The claims asserted by respondent in the State Court Action fall within the scope of the Arbitration Agreement that respondent executed. The Arbitration Agreement specifically provides that it encompasses discrimination claims based upon sex:

> 4. This Agreement is intended to cover *all civil claims . . . including and not limited to, claims of employment discrimination on the basis of race, sex,* age, religion, color, national origin, disability and veteran status (including claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities.

Morris Aff. Ex. E (emphasis supplied).

24. The Arbitration Agreement further requires Peacock to arbitrate her claims against Alice Morris and William Belott (the "Individual Defendants" in the State

Court Action), as well as her claims against Great Western, in that it explicitly encompasses "claims against individuals." *Id.* Accordingly, all claims asserted by Peacock against Great Western, Alice Morris and William Belott in the State Court Action are subject to mandatory arbitration as set forth in the Arbitration Agreement between Peacock and Great Western.

25. Respondent admits in the state Court Action that she executed the Arbitration Agreement with Great Western. Petitioner has met its burden, under Section 4 of the FAA, of demonstrating that this dispute is within the scope of that agreement and is referable to arbitration. As petitioner has demonstrated a likelihood of success on the merits of the Petition, and will be irreparably harmed if the State Court Action is allowed to proceed, in that the State Court Action will necessarily decide the issue of Great Western's liability and may nullify the effect of the Arbitration Agreement, petitioner is entitled to a stay of the State Court Action.

WHEREFORE petitioner prays that, pursuant to the provisions of Section 4 of the FAA, 9 U.S.C. § 4, the Court issue an order directing respondent to proceed to arbitration in accordance with the requirements of the Arbitration Agreement; and petitioner further prays that the Court issue an order to stay the State Court Action brought by respondent against the petitioner and the Individual Defendants in its entirety until arbitration has been had; and that the petitioner be awarded the costs of this application, and such other or further relief as may be necessary.

Dated: Pleasantville, Now Jersey
January 31, 1996

YOUNGBLOOD, CORCORAN,
ALELI, LAFFERTY,
STACKHOUSE, GROSSMAN &
GORMLEY, P.A.

By: /s/ John Aleli
John Aleli (JA-8181)
3205 Fire Road, PO Box 850
Pleasantville, New Jersey
08232-0850
(609) 645-2201

and

BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Petitioner

TO: Neil Mullen, Esq.
SMITH MULLEN, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052-3377

VERIFICATION

JOHN ALELI, being duly sworn, deposes and says that I am a partner in the firm of Youngblood, Corcoran, Aleli, Lafferty, Stackhouse, Grossman & Gormley, P.A., 3205 Fire Road, Pleasantville, New Jersey, and I have read the foregoing petition and the affidavits in support thereof, and I know the content thereof. I hereby certify

that all matters set forth therein are verified in the accompanying affidavits of Alice Morris, A. Hollie Hussey, and Joseph A. Coorough, except those matters which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

/s/ John Aleli
JOHN ALELI

Sworn to before me this
30th day of January, 1996.

/s/ Vicki L. Hood
Notary Public

VICKI L. HOOD
NOTARY PUBLIC OR NEW JERSEY
MY COMMISSION EXPIRES FEB 23, 1998

HUMAN RESOURCES DEPARTMENT

	SECTION:	**EMPLOYEE RELATIONS**
BINDING ARBITRATION	NUMBER:	05-02-06
Page 1 of 5	EFFECTIVE:	07/01/92

[LOGO]

PURPOSE

The Company has implemented a policy requiring binding arbitration, establishing procedures designed for the quick and inexpensive resolution of disputes regarding employment or termination of employment. Binding arbitration ("arbitration") provides the opportunity for employees and the Company to have employment disputes heard and resolved in a private and informal setting by an impartial person with expertise in the employment field. The arbitration procedures set forth in this policy shall be followed if and when a dispute arises.

POLICY STATEMENT

1. Great Western has adopted an arbitration policy to resolve any and all employment related disputes, giving rise to claims for civil damages or other civil remedies, between the Company and an employee hired on or after July 1, 1992.

2. As a condition of employment, individuals hired on or after July 1, 1992, are required to arbitrate employment disputes and to sign an arbitration agreement. The option of using arbitration is also available to employees hired prior to July 1, 1992.

3. Disputes consist of all civil claims, excluding claims under the Workers' Compensation Act, but including, and not limited to, employment discrimination based on race, sex, age, religion, color, national origin, disability, and veteran status (including claims under Title VII of the Civil Rights Act of 1964; Age Discrimination in Employment Act; Americans With Disabilities Act; and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities.

4. Arbitration is in lieu of any and all other legal proceedings, including, but not limited to, lawsuits and other administrative proceedings (e.g. EEOC, DOL, etc.), although neither an employee nor the Company is precluded, however, from seeking injunctive relief through the courts where such relief is warranted.

5. Arbitration may be initiated by either Great Western or the employee.

6. Arbitration must be initiated within one (1) year of the occurrence of the event giving rise to the dispute; provided, however, that where criminal conduct is involved, arbitration to pursue civil claims arising out of such conduct must be initiated within one (1) year from the date of discovery of the conduct. Failure to initiate arbitration within the applicable one-year period shall constitute a waiver of any and all such civil claims. Arbitration is considered to be initiated at the time the notice of arbitration is received. Both the employee and the Company are expected to use their best efforts to conclude the arbitration within ninety (90) days of the date initiated.

7. Employees (current and former) are required to use the Employee Grievance Procedures prior to initiating arbitration. Information regarding filing an employee grievance is in the Employee Grievance Policy (05-02-04), or may be obtained from the employee's local Human Resources Regional Office.

PROCEDURE

8. To begin the arbitration process, the employee or Great Western must notify the other, either by personal delivery or certified mail, a notice of their decision to initiate arbitration. The notification should include employee name; home address; work location, address and phone number; date and location of occurrence; concise details of the occurrence; and the remedy requested.

9. The notice of arbitration may either be made on Great Western's pre-printed form, or otherwise in writing. Notice of arbitration initiated by the Company will be mailed to the last known residence address of the employee as reflected in Great Western's records. Notice of arbitration initiated by the employee must either be personally delivered or sent via certified mail to:

   Great Western Human Resources
   c/o Grievance Committee
   19809 Prairie Street, NSC #10
   Chatsworth, CA 91311

10. If either the employee or Great Western refuses to participate in the arbitration proceedings, the party initiating arbitration may file with the court a petition to compel arbitration.

11. Within ten (10) business days after receipt of notice of arbitration, the Company will use its best efforts to commence arbitration proceedings by submitting the dispute to the Judicial Arbitration & Mediation

Services ("J.A.M.S."), or, if applicable, a comparable arbitration service.

12. Within ten (10) business days after receipt of notice of arbitration, the employee and the Company will attempt to agree upon a mutually acceptable arbitrator from the arbitration service chosen. If the Company and the employee are unable to agree, J.A.M.S. or the alternative arbitration service will provide a list of three prospective arbitrators. The employee will first strike one from the list, and Great Western will then strike one of the remaining prospective arbitrators. The remaining arbitrator will arbitrate the dispute.

13. The arbitration will take place at the J.A.M.S. office within the state and closest to the place of employee's current employment with Great Western, or closest to the place of employee's place of employment with Great Western at the time of termination, unless the employee and Great Western agree to have the arbitration take place at another J.A.M.S. office. If J.A.M.S. does not operate in the state where the employee is currently employed by Great Western, or was employed by Great Western at the time of termination, and the employee and Great Western do not agree to have the dispute arbitrated at another J.A.M.S. office or a comparable alternative arbitration service, the dispute will be submitted by Great Western to a comparable alternative arbitration service within the state where the employee is currently employed by Great Western or was employed by Great Western at the time of termination.

14. At the request of either the employee or Great Western, the arbitrator will schedule a pre-hearing conference to agree on procedural matters, arrange for exchange of information, determine the number and

identity of witnesses to be called, obtain stipulations and attempt to narrow the issues.

15. To expedite arbitration, the employee and Great Western agree to eliminate discovery. In its place, each party may make a written demand on the other for lists of witnesses to be called and/or documents to be introduced at the hearing. The demand of each must be made and received by the other prior to the pre-hearing conference. The lists must be delivered within ten (10) business days of receipt of the demand. No depositions may be taken for discovery.

16. Both parties may file a brief with the arbitrator. Each brief must be served on the arbitrator and the other party at lest five (5) business days prior to the hearing, and if not timely served must be disregarded by the arbitrator. Each brief must specify the facts the party intends to prove, must analyze the applicable law or policy, and must specify the remedy sought.

17. Both parties have the right to be represented by an attorney and each party is responsible for paying its own attorney's fees.

18. The employee is responsible for paying his/her transportation costs associated with travel to and from the arbitration site. The employee may use available vacation time as salary continuance to attend the arbitration hearing. Once vacation time is exhausted, pay will not be granted.

19. At the sole discretion of the arbitrator, each party may call and examine witnesses, introduce exhibits and other documents, and cross examine and impeach witnesses. The arbitrator is not required to follow strict rules of evidence. Testimony will be taken under oath. The arbitrator must hear all the evidence material to an issue and determine what is relevant and the weight to be given to the evidence.

Each party will pay it's own witness fees. Great Western employees called to the arbitration hearing as witnesses will be "on call" for the hearing and will be paid by Great Western for travel time, expenses, and actual time spent testifying at the hearing.

20. Either party desiring a stenographic record may arrange for a certified court reporter to attend the proceedings. The requesting party must notify the other of the arrangements at least two (2) business days in advance of the hearing and must pay for the cost incurred. If the other party desires a copy of the stenographic record, it will make its own arrangements with the court reporter and pay for the copy.

21. Any postponement or cancellation fee imposed by the arbitration service will be paid by the party requesting the postponement or cancellation.

22. During the time the arbitration proceedings are ongoing, the Company will advance any required administrative and/or arbitrator fees.

23. Within five (5) business days of the hearing's conclusion, each party may submit a brief commenting on the evidence and issues raised at the hearing.

24. The decision of the arbitrator will be based on the evidence introduced at the hearing, including all logical and reasonable inferences. The arbitrator will decide all issues concerning the dispute, and the decision will be final and binding.

25. The arbitrator may award any remedy or relief which is just and equitable, except the arbitrator may not award punitive or exemplary damages, or double or treble damages. The award must be made in writing, signed by the arbitrator, mailed to both parties within fifteen (15) business days of the hearing, and contain a concise statement of the reasons

for the decision. The party or parties against whom the award has been made shall promptly pay the award, although in no event will the employee be required to pay more than $250 for that portion, if any, of an arbitration award against the employee designated as administrative and/or arbitrator fees. The award may be judicially enforced.

FORMS

- Binding Arbitration Agreement, Form 5061 (6/92), to be completed as a condition of employment. Great Western keeps the original agreement (white copy), employee retains the yellow copy.
- Notice of Arbitration Form – To be completed, and a copy retained, by the party requesting arbitration.

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith, is not in issue, the court shall make an order directing the parties

to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-3, provides as follows:

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, affectional or

sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State, but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies;

relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-13, provides in pertinent part as follows:

Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute. Prosecution such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-27.1, provides as follows:

In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a

determination that the charge was brought in bad faith.

The New Jersey Constitution, N.J.S.Const. art. I, ¶ 9 (1973) provides in pertinent part:

> **Trial by jury; jury of six persons; verdict in civil cases; trial of mental incompetency without jury**
>
> The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than 5-6 of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 10 1997
CLERK

(2)

No. 97-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHELE PEACOCK,

Petitioner,

vs.

GREAT WESTERN MORTGAGE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROGER J. HAWKE, ESQ.*
ELIZABETH B. LYNCH, ESQ.
BROWN & WOOD LLP
One World Trade Center
New York, New York 10048-0557
(212) 839-5300

– and –

J. MICHAEL RIORDAN, ESQ.
BRESSLER, AMERY & ROSS, P.C.
325 Columbia Turnpike
Florham Park, New Jersey 07932
(201) 514-1200

Counsel for Respondent Great Western Mortgage Corporation

**Counsel of Record*

14 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Great Western Mortgage Corporation, which was dissolved as of December 31, 1996, had the following corporate parents: Great Western Service Corporation Three; Great Western Bank; and Great Western Financial Corporation, which was merged into New American Capital, Inc. as of July 1, 1997. There were no non-wholly owned subsidiaries of Great Western Mortgage Corporation.

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Supreme Court Rule 10 8

STATEMENT OF THE CASE

Petitioner claims that she was "forced" to sign an arbitration agreement with Great Western Mortgage Corporation ("Great Western") that "stripped" her of her rights and remedies under state law. (Petition at 7, 22.) The courts below rejected her claim of coercion. The Court of Appeals for the Third Circuit found that petitioner, a college graduate with a Bachelor of Science degree in Business Administration, had agreed not once, but three times, to arbitrate employment disputes with Great Western. (App. 12, 16, 19.) The first time was on August 9, 1994 when she applied for a job and unreservedly accepted arbitration as a condition of employment. (App. 31.) Petitioner also agreed, in the employment application, to sign Great Western's Binding Arbitration Agreement once she became employed. The second time was on September 26, 1994, after her employment commenced, when petitioner signed the one-page "Binding Arbitration Agreement". (App. 12, 49.)

Petitioner's third agreement to arbitrate occurred after she had asserted her claim of sexual harassment. On August 23, 1995 petitioner and her counsel, Hannoch Weisman, actually commenced arbitration against Great Western. (App. 4, 12-13, 60.) The voluntary initiation of arbitration by petitioner and her attorneys is not mentioned in the Petition.

The Court of Appeals found "no indication" in the record that Peacock had been coerced or defrauded in agreeing to arbitrate. (App. 16.) Accordingly, it ruled that the District Court was correct in finding that petitioner had "willingly agreed to arbitrate under Great Western's Arbitration Agreement". (App. 16.)

On October 25, 1995 petitioner's new attorneys purported to withdraw her "consent to arbitration". (App. 5.) Petitioner

then commenced an action in New Jersey Superior Court against Great Western and two of its employees, asserting a claim under the New Jersey Law Against Discrimination (the "NJLAD"), N.J. Stat. Ann. 10:5-1 *et seq.* (App. 5.) Great Western answered that complaint on January 30, 1996. (App. 33-34.) On February 1, 1996 Great Western filed a petition in the U.S. District Court for the District of New Jersey under Section 4 of the Federal Arbitration Act (the "FAA" or the "Act"), 9 U.S.C. § 1 *et seq.*, to compel arbitration and to stay the state court proceeding. (App. 5.) That petition was granted on April 9, 1996. (App. 37.)

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE SCOPE OF SECTION 1 OF THE FEDERAL ARBITRATION ACT.

Section 1 of the FAA excludes from the coverage of Section 2:

> "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

9 U.S.C. § 1. Petitioner claims that this language means that "all contracts of employment" are excluded from coverage, not just employment contracts for employees in transportation-related industries. (Petition at 9.) Every one of the nine U.S. Courts of Appeals that have squarely ruled on this issue, however, has rejected petitioner's interpretation. The decisions of the Circuit Courts are not in conflict.

The Third Circuit, in ruling that the exclusion in Section 1 was limited to employees acting directly in the channels of

commerce itself, followed its *en banc* decision in *Tenney Eng'g, Inc.* v. *United Elec. Radio & Mach. Workers of America*, 207 F.2d 450 (3d Cir. 1953). (App. 9.) The statutory analysis and conclusions of *Tenney* have been approved by eight other Circuits, three of which ruled as recently as March, May and June 1997. Thus, Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and D.C. Circuits have rejected petitioner's argument that the Section 1 exemption applies to "all contracts of employment". *See Dickstein* v. *duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dancu* v. *Coopers & Lybrand*, 778 F. Supp. 832, 834 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992); *O'Neil* v. *Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas* v. *TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co.* v. *Bates*, 71 F.3d 592, 597-99 (6th Cir. 1995) (the Sixth Circuit overruled contrary *dicta* in *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991)); *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 356-57 (7th Cir. 1997); *Patterson* v. *Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Cole* v. *Burns Int'l Security Services*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997).

The only Circuit Court decision that petitioner cites in support of her expansive reading of Section 1 is *United Elec., Radio & Mach. Workers of America* v. *Miller Metal Prods.*, 215 F.2d 221 (4th Cir. 1954). There, however, the court held that the arbitration clause, which was contained in a collective bargaining agreement, did not cover a dispute arising out of the breach of a no-strike clause in that agreement. 215 F.2d at 223. The court went on to state, in *dictum*, that "even if" there had been an agreement to arbitrate, the Section 1 exemption would apply. *Id.* On June 13, 1997, however, the Fourth Circuit, in *O'Neil* v. *Hilton Head Hospital*, agreed with the "uniform body of precedent" that the Section 1 exemption

was limited to "seamen, railroad workers, and other workers actually involved in the interstate transportation of goods". 115 F.3d at 274 (citations omitted). The court ruled that *Miller Metal Products* was not to the contrary inasmuch as it antedated Supreme Court precedents supporting arbitration and did not apply to individual employment contracts. *Id.* at 274 n.1.

Petitioner argues that the reference to seamen and railroad workers was not a limitation on the exclusion. Rather, it was "simply an effort to illustrate the types of workers who were then within the reach of Congress' power under the Commerce Clause". (Petition at 14-15.) However, it is Section 2, not Section 1, that deals with the "reach of Congress's power". *See* 9 U.S.C. § 2. Section 1 merely provides an exclusion from Section 2's coverage. The Commerce Clause does not limit the power of Congress to exclude contracts from the coverage of the Act. Accordingly, there was no need, in describing an exclusion, to "cover broadly all classes of workers then subject to the reach of the commerce clause". (Petition at 15.) If the exclusion were intended to be as far-reaching as the statute itself, as petitioner contends, all Congress had to do was put a period after the words "nothing herein shall apply to contracts of employment" in Section 1. That would have excluded all employment contracts covered under Section 2. There would have been no need to refer to seamen, railroad employees or any other "class of workers". The Circuit Courts agree that under petitioner's reading of the statute, this language would have been superfluous. *See, e.g., O'Neil* v. *Hilton Head Hospital*, 115 F.3d at 274; *Cole* v. *Burns Int'l Security Services*, 105 F.3d at 1470; *Rojas* v. *TK Communications, Inc.*, 87 F.3d at 748.

Petitioner's argument, finally, ignores the language differences between Section 1 and Section 2. Section 2 provides that arbitration agreements are enforceable if the contract

evidences a transaction "involving commerce". Section 1, on the other hand, does not use the term "involving commerce". It refers to workers "engaged in foreign or interstate commerce". In *Cole*, the court pointed out that in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995), the Supreme Court found this difference in wording to be significant. The Supreme Court stated that the words "involving commerce" are far broader than the words "in commerce" and that "involving commerce" covers more than "only persons or activities within the flow of interstate commerce". *See Cole*, 105 F.3d at 1471. The court in *Cole* stated that this analysis suggested that the Section 1 exclusion of classes of workers "engaged in foreign or interstate commerce" covered only those workers actually involved in the "flow of commerce" -- *i.e.*, "those workers responsible for the transportation and distribution of goods". *Id.* at 1472.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE VALIDITY OF A PROSPECTIVE WAIVER OF A JURY TRIAL OR WAIVER OF PUNITIVE DAMAGES

Petitioner claims there is a conflict between the Third and Eighth Circuits on whether a prospective waiver of a judicial forum is enforceable in a case arising under federal or state anti-discrimination laws. (Petition at 19.) There is no conflict. The Supreme Court ruled in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that a prospective agreement to arbitrate a discrimination claim under the ADEA is enforceable under the Act. That ruling has been extended to Title VII and state discrimination claims. *See Rojas* v. *TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996) (arbitration of Title VII claims); *Bender* v. *A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992) (Title VII sexual harassment claim); *Mago* v. *Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (Title VII claims of

sexual harassment and discrimination); *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (Title VII and sexual harassment claims under Kentucky law); *Beauchamp* v. *Great West Life Assurance Co.*, 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (ADEA and Title VII claims); *Crawford* v. *West Jersey Health Sys.*, 847 F. Supp. 1232, 1240-42 (D.N.J. 1994) (Title VII and NJLAD claims); *Steck* v. *Smith Barney Harris Upham & Co.*, 661 F. Supp. 543, 547-48 (D.N.J. 1987) (NJLAD claims).

Petitioner ignores *Gilmer* and all of the authorities that uphold prospective agreements to arbitrate discrimination claims. Instead, she relies upon an overruled decision of the Eighth Circuit in *Swenson* v. *Management Resources Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989), for the proposition that federal claims under Title VII are not arbitrable.[1] In *Patterson* v. *Tenet Healthcare, Inc.*, 113 F.3d at 838, the Eighth Circuit acknowledged that *Gilmer* had "effectively overruled" *Swenson*. The court agreed with, and followed, the many post-*Gilmer* decisions that have held that Title VII claims are subject to agreements to arbitrate. There is no conflict among the Circuits on this point.

Petitioner conjures up another "conflict" -- this time between the Third and Ninth Circuits -- on whether a restriction in the Arbitration Agreement on the recovery of punitive damages is enforceable under the FAA. (Petition at 22.) Petitioner's argument, however, rests upon her claim that all

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[1] Petitioner also cites *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). (Petition at 20-22.) As *Gilmer* made clear, however, *Alexander* did not involve the enforceability of an agreement to arbitrate statutory discrimination claims. Rather, it held only that an employee's arbitration of contract claims, pursuant to the arbitration clause of a collective bargaining agreement, did not bar the employee from litigating in court a statutory claim that was *not* covered under any agreement to arbitrate. *See Gilmer*, 500 U.S. at 35.

employee agreements to arbitrate are "coerced", and therefore unenforceable, if they are conditions of employment. That proposition is wrong as a matter of law and was rejected in *Gilmer*. *See Gilmer*, 500 U.S. at 33. Petitioner asks the Supreme Court to review the facts of this case and to conclude that all three of her agreements to arbitrate, which were made both before and after the dispute arose, were "involuntary". It is not the function of a writ of certiorari to review factual determinations of this type.

Contrary to petitioner's argument, the Third Circuit did *not* rule on the validity of the waiver of punitive damages. Rather, it stated that it would not do so and that that issue was for the arbitrators to decide. (App. 21-22.) The court did, however, cite *Swarts* v. *Sherwin-Williams Co.*, 581 A.2d 1328, 1331 (N.J. Super. Ct. App. Div. 1990), which held that knowing and voluntary waivers of statutory rights are not barred under the NJLAD. (App. 21).

The Supreme Court made clear in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), that whether or not punitive damages are available in arbitration is governed by the terms of the contract. If the contracting parties agree to include punitive damages within the issues to be arbitrated, then the FAA requires that such agreement be enforced according to its terms. 514 U.S. at 58. If, however, there is a "contractual intent to the contrary", then punitive damages would not be available. *Id.* at 59. In short, there is no federal policy that renders agreements to waive punitive damages in arbitration void and unenforceable.

Petitioner's reliance upon *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995), is misplaced. The court there found that the franchise agreement with ARCO was coercive and violated a federal statute -- the Petroleum Marketing Practices Act. That case does not support petitioner's argument that she was "coerced"

on three occasions to agree to arbitrate, nor does it support her broader argument that *any* employee arbitration agreement that is a condition of employment is "coerced" and unenforceable as a matter of law.

Petitioner also argues that a writ of certiorari should be granted on the ground that the Arbitration Agreement precludes "all discovery". (Petition at 26.) Petitioner points to no conflict among the Circuits on this point. Instead, she makes the grandiose claim that the provisions of Great Western's Arbitration Agreement relating to discovery will somehow bring about the "evisceration of our nation's civil rights laws". (Petition at 29.)

Contrary to petitioner's argument, the Arbitration Agreement provides for discovery of documents (App. 69), and it authorizes the arbitrator to "arrange for exchange of information" -- *i.e.*, informal disclosure. (App. 68.) The Court of Appeals ruled that a waiver of "litigation-type" discovery is enforceable under the FAA. (App. 19-20.) The court stated, however, that inasmuch as Great Western agreed that informal discovery would be available at the arbitration, there was "no point at issue". (App. 20 n.37.)

It is well-settled that parties to arbitrations give up litigation-type discovery. *See Gilmer*, 500 U.S. at 31; *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ("the right to pre-trial discovery" is relinquished). The degree of discovery that is allowed under a particular arbitration agreement is hardly an "important matter" that falls within the purview of Rule 10 of the Supreme Court Rules.

CONCLUSION

The decision below is not in conflict with the decision of another Circuit on the same important matter. The Petition should be denied.

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Respectfully submitted,

ROGER J. HAWKE, ESQ.*
ELIZABETH B. LYNCH, ESQ.
BROWN & WOOD LLP
One World Trade Center
New York, New York 10048-0557
(212) 839-5300

– and –

J. MICHAEL RIORDAN, ESQ.
BRESSLER, AMERY & ROSS, P.C.
325 Columbia Turnpike
Florham Park, New Jersey 07932
(201) 514-1200

Counsel for Respondent Great Western Mortgage Corporation

**Counsel of Record*